80-936

No.

Supreme Court, U.S.
FILED
DEC 5 1980
MICHAEL RODAK, JR.,

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NATIONAL SUPER SPUDS, INC., *et al.*,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did Congress create an implied cause of action for damages against commodity brokers under the following provisions of the Commodity Exchange Act:

> (i) section 4a which authorizes the Commodity Futures Trading Commission, formerly the Commodity Exchange Commission, to set speculative trading and position limits for specific commodity futures contracts and which makes it unlawful to exceed those limits;
>
> (ii) section 4b which makes it unlawful for a member of a commodity exchange "to cheat or defraud" his customers; and
>
> (iii) section 9(b) which makes it a felony for any person "to manipulate . . . the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner . . . any such commodity. . ."

despite expressly providing many judicial and administrative means of enforcing these provisions including criminal penalties, civil fines and an administrative remedy for plaintiffs' claims.

* * *

Similar issues are the subject of the pending petition in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, (U.S. Aug. 9, 1980) (No. 80-203). In addition, the question whether Section 5(d), 5a(8) or 9(b) of the CEA provides an implied cause of action for damages against a commodity exchange and its officials is the subject of the pending petition of the New York Mercantile Exchange ("Exchange") in one of these cases.

The present cases and the *Curran* case together provide the op-

portunity for review of the implied cause of action most of the key provisions of the CEA. See Brief *An* with Respect to Petition for a Writ of *Certiorari* file change in *Curran.**

PARTIES BELOW

The parties to the three consolidated appeals belo

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incon

Appellees: Heinold Commodities, Inc. ("Heino son & McKinnon Auchincloss Kohlmeyer Ir son"), Clayton Brokerage Co. of St. Louis, Excl ard B. Levine, Howard Gabler, and Alfred Pen

No. 79-7464

Appellant: Incomco,

Appellee: Exchange.

No. 79-7482

Appellants: National Super Spuds, Inc., Williar Jr., Willard C. Shiner, Eugene P. Weisman, Ri Raymond Rothberg, Arthur S. Armstrong, Tl nek, Capgain Holdings, Inc., and Heiz Rommi

Appellees: Heinold and Thomson.

Heinold and Thomson seek review of the judg 79-7402 and No. 79-7482. Heinold and Thom parties to the appeal in No. 79-7464.

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*The following abbreviations are sometimes used in "CEA" for the Commodity Exchange Act, as amended (*seq.*); "CFTC" for Commodity Futures Trading Commis for futures commission merchant. In addition, the page n majority and dissenting opinions which are cited in this P page numbers appearing in the opinions as issued by Appeals. These opinions are contained in the Appendix (

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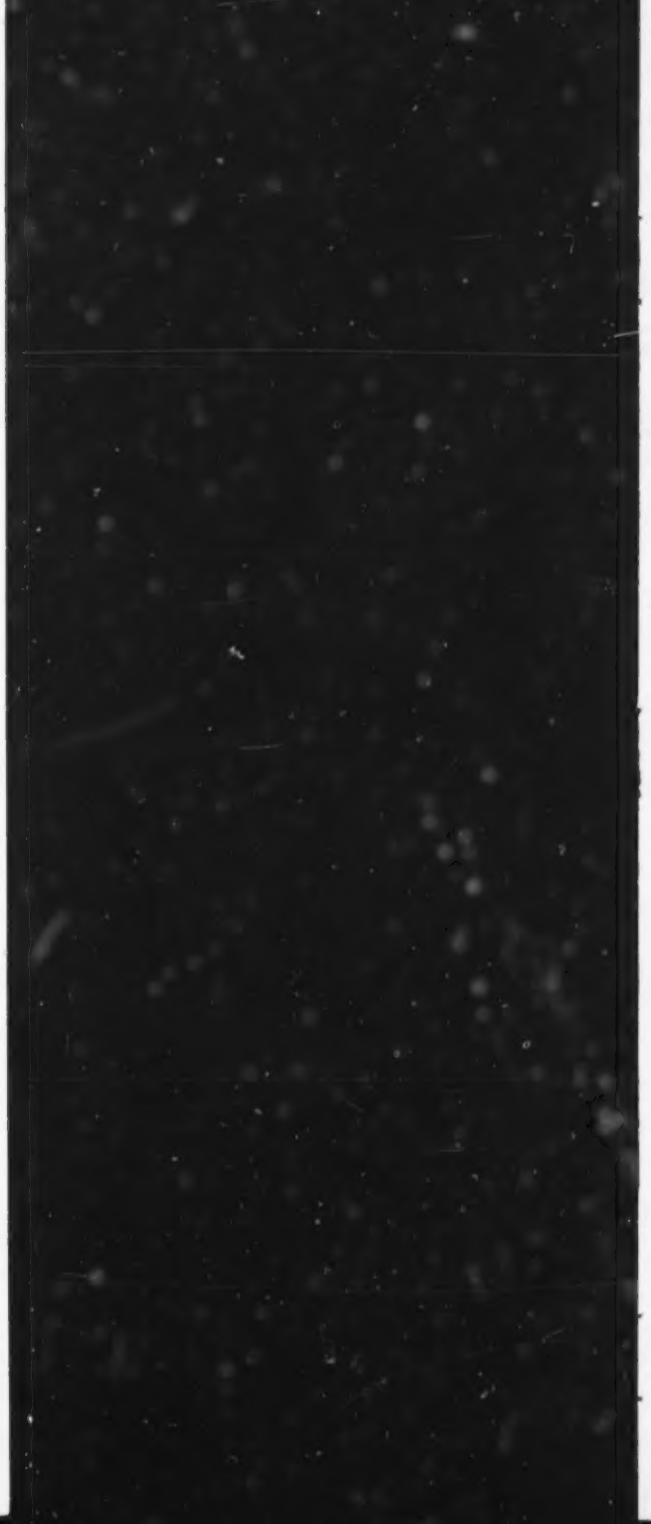

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 4a, 4b and 9(b) of the Commodity Exchange Act, as amended (7 U.S.C. §§6a, 6b and 13(b)), and Article I, Section 1 of the United States Constitution are set forth in the Appendix hereto (192a-213a).

STATEMENT OF THE CASE

Petitioners are commodity brokers which are registered as "futures commission merchants" with the CFTC. The two cases in which these petitioners are defendants charge petitioners with violations of Sections 4a, 4b and 9(b) of the CEA. Section 4a, which was enacted in 1936, authorizes the CFTC to set speculative trading and position limits for commodity futures contracts and makes it unlawful to exceed those limits. Section 4b, which also was enacted in 1936, makes it "unlawful to cheat or defraud" a customer in connection with the making of futures contracts.[1] Section 9(b) prohibits any person from manipulating the price of or cornering any commodity in interstate commerce or for future delivery on or subject to the rules of any commodity exchange. This language was added in 1936 to Section 9 of the Grain Futures Act of 1922. All three sections are criminal provisions.

None of these sections, nor any other provision of the Act, expressly authorizes the institution of actions by traders in the federal courts; nor does the CEA provide a general grant of jurisdiction to the federal courts to hear such actions as was provided in the 1933 and 1934 Securities Acts.

The CEA does, however, expressly provide for fines and imprisonment in criminal prosecutions, and for numerous other judicial and administrative means for enforcing these provisions. Among

[1]The language of Section 4b is strikingly similar to the language of Section 206 of the Investment Advisers Act of 1940 (15 U.S.C. §80b-1 *et seq.*) which this Court held in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) did not provide a private cause of action for damages.

those means, enacted in 1974, is an administrative proceeding before the CFTC for the redress of any person's claims or grievances against FCMs such as petitioners. Plaintiffs' claims against the petitioners could have been presented and adjudicated in such an administrative proceeding.

Plaintiffs in these actions are traders who held long positions in May 1976 Maine potato futures contracts which were liquidated prior to the close of trading on May 7, 1976. All of these plaintiffs are admittedly "speculators" as distinct from "hedgers," the latter being persons who produce, use, handle, or merchandise a particular commodity. None of the plaintiffs was a customer of these petitioners with respect to the purchase of their "long" contracts. Indeed, petitioners acted as brokers for persons on the opposite side of the market from plaintiffs.

The District Court granted these petitioners' motions for summary judgment on the counts in the complaints which charge violations of Sections 4a, 4b and 9(b) of the CEA.[2] The plaintiffs appe ed and over the vigorous and well-reasoned dissent of Judg Mansfield, the Court of Appeals reversed.[3]

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[2]The jurisdiction of the District Court in No. 79-7402 with respect to the claims asserted under the CEA was allegedly based on 28 U.S.C. §§ 1331 and 1337 and in No. 79-7482 jurisdiction was allegedly based on 28 U.S.C. §1337.

[3]In reaching its decision, the District Court applied the test enunciated in *Cort* v. *Ash*, 422 U.S. 66 (1975) and applied in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). The District Court did not have the benefit of this Court's decisions in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). After examining the provisions of the CEA which provide the CFTC with an array of enforcement powers and these plaintiffs with an administrative remedy to recover damages arising from violations of the Act, the District Court held that no private right of action against futures commission merchants existed under that Act because "two critical elements of the [*Cort* v. *Ash*] test, congressional intent and consistency with the statutory scheme, weigh strongly against the implication of such a right." (470 F.Supp. at 1261)

REASONS WHY THE WRIT SHOULD BE ALLOWE

Since the enactment of the 1974 amendments to the CEA, question of the existence of implied private rights of action un the CEA has frequently been presented to the courts. The maj ty opinion lists at least nineteen decisions upholding such rig and eight decisions in addition to that of the district court in th cases denying such rights.[4] The split of decisions requires a fi and definitive answer by this Court.

The questions before the Court are of extraordinary pract importance to the commodity futures industry. The decisior the Court of Appeals, if permitted to stand, will expose comm ty brokers to enormous liability, never intended by Congress, will vitiate Congressionally-mandated procedures governing olution of disputes between commodity brokers and their c tomers. The reparations procedure provided by the 1974 ame ments to the CEA and other non-judicial means for resolv complaints such as arbitration will be undermined and the cos resolving customer grievances is likely to increase.[5]

[4]Other decisions which are not cited in the opinions below but wh have passed on implied causes of action under certain provisions of CEA include *Gonzalez* v. *Paine, Webber, Jackson & Curtis, Inc.*, F.Supp. 499 (S.D.N.Y. 1980); *Mullis* v. *Merrill Lynch, Pierce, Fe & Smith, Inc.*, 492 F.Supp. 1345 (D.Nev. 1980); *Hensley* v. *Madu Sons, Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶21,017 (C.D.Cal. Ap 1980); and *Comstock Investors, Inc.* v. *Rosenthal & Co.*, [1977-1 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,934 (C.D. December 7, 1979). The courts in each of these cases denied the tence of implied causes of action under the CEA. Since the deci sought to be reviewed, other lower courts have faced the issue and sharp division of judicial opinion continues. See *Gray* v. *Thon McKinnon Securities, Inc.*, No. C-79-3325 SAW (N.D. Cal. Septen 29, 1980) (denying an implied cause of action).

[5]In 1974, Congress required contract markets to establish proced for private arbitration of customers' claims and grievances against exchange member (7 U.S.C. §7a(11)). In addition, a registered fut association must provide procedures for the resolution of custon claims and grievances against any member of the association (7 U. §21(b)(10)).

In addition, the decision of the Court of Appeals will ope doors of the district courts to a large body of additional new l tion which Congress has never expressly authorized. This is l tion of a type which this Court has held "presents a danger o atiousness different in degree and in kind from that which ac panies litigation in general." *Blue Chip Stamps* v. *Manor Stores*, 421 U.S. 723, 739 (1975). The present cases well trate this point. Petitioners are charged with cheating an frauding persons with whom they have had no relationship. I dition, in these cases the longs are claiming manipulation b shorts and the shorts are asserting manipulation by the longs the interacting net effect of these alleged manipulations on ket prices at any specific time is impossible of even rough mea ment.

The holding of the Court of Appeals majority that Sectio 4b and 9(b) of the CEA provide implied causes of actio damages in favor of these plaintiffs is erroneous and confli principle with the decisions of this Court setting forth the dards for the implication of private causes of action.[6] The ho —which, as pointed out in Judge Mansfield's dissent, goes beyond statutory construction and amounts instead to "ju legislation"— (i) raises important questions of constitution in light of the vesting of legislative powers exclusive Congress; (ii) erroneously assumes that the issue is wheth private cause of action" exists under the CEA generally, r

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[6] *Transamerica*, *supra*; *Redington*, *supra*; *Kissinger* v. *Reporters mittee for Freedom of the Press*, 445 U.S. 136 (1980); *Cannon*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); *Blue Chip Stamps*, *Cort*, *supra*; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (*Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977); *Securit vestor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975); *Nationa road Passenger Corp.* v. *National Association of Railroad Passe* 414 U.S. 453 (1974) ("*Amtrak*"); *Wheeldin* v. *Wheeler*, 373 U. (1963); *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959); *S men's Union* v. *National Mediation Board*, 320 U.S. 297 (194 Judge Mansfield's dissent at pp. 4107-11.

than whether these plaintiffs can base an implied ca
for damages on either Section 4a, 4b or 9(b); (iii)
the principles established in this Court's decisions
statute expressly provides many judicial and a
means of enforcement, including criminal penalti
and an express administrative remedy, an addit
remedy will rarely be implied; (iv) is based on t
assertion that Congress, by amending various pro
CEA in 1974, "re-enacted" Sections 4a, 4b and 9
the judicial interpretations given to the Act by a fe
decisions based on clearly erroneous grounds; (v) er
sumes that pre-1974 decisions had unanimously and
interpreted the CEA as providing the causes of act
plaintiffs' claims are based despite the fact that *no p*
sion had held that members of a class to which pla
had a cause of action for damages under either Sec
9(b); (vi) erroneously avoids analysis of the legislat
these sections at the time of their enactment; and (vi
clusions as to the intent of the 1974 Congress which
to the legislative history.

If *certiorari* is granted, this *will be the first time t*
raised by the petitioners will have been placed before

**A. Since Congress Did Not Provide Any Private Ri
Under Any Of The Provisions Of The CEA,
That Such Rights Can Be Implied Under Sectio
9(b) Of That Act Raises Important Questions
tional Law In Light Of The Vesting Of Legisl
Exclusively In The Congress.**

Article I of the Constitution vests "all legislative p
Congress. Under Article III, Congress also has
sponsibility for determining the jurisdiction of the
courts. Congress alone can create rights of action a
diction over them in the courts. Article III also make

the legislative power can only be exercised through
both Houses of "bills" which after approval by
become "laws." While courts can construe such law
what Congress did in fact enact, the courts have no
what they may feel Congress omitted, even inadv
ever desirable the courts may feel such additions w
cannot rewrite or correct the laws they are called
strue.

Thus, under our Constitution, a right of action u
"law" cannot exist unless Congress intended to cre
law was passed, and has somehow made its intenti
creation must be unmistakably the "act" of Cong
Mansfield said in his dissent (p. 4111): "Absent ev
intent, judicial creation of a private remedy amo
sumption or usurpation of the legislative function
the separation of powers doctrine." Even if these
tional principles have been occasionally overlook
such oversights cannot operate to amend the Const
made clear in *Erie Railroad Co.* v. *Tompkins*, 304
(1938).[7]

In the days before *Erie* when the federal court
existence of a federal common law, the courts utili
law theory to justify actions for damages for brea
statute, treating such breach as a "tort." Thus this
& Pacific R. Co. v. *Rigsby*, 241 U.S. 33 (1916), he
ployee could bring an action based on an injury du
of the federal Safety Applicance Act. The Court

> "A disregard of the command of the statute
> act, and where it results in damage to one c

[7] *See TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978); *Sink*
99 U.S. 700, 718 (1878); *Cannon*, 441 U.S. 677, 730-49
senting); *See also Wilson* v. *First Houston Investment*
1235, 1244-45 (5th Cir. 1978) (Hill, J., dissenting), *va*
on Transamerica, 444 U.S. 959 (1979).

> whose especial benefit the statute was
> recover the damages from the party in
> cording to a doctrine of the common l
> 39)

No effort was made to ascertain whether
create a cause of action; on common law pri
. . . be deemed to create a liability in [plainti
in the form of an actionable tort.

The concept of a violation of a statute c
able tort is embodied in the *Restatement*
(1963). Logically, its validity with respect t
ended with *Erie Railroad*, which made it
federal common law, and hence no feder
However, the outdated tort rationale was th
lower court decisions upholding implied ri
the majority opinion.

Under the "tort theory," an action co
brought without any evidence of Congressi
the statute prohibited certain conduct and
was an obvious beneficiary of the prohibitio
nition that under the Constitution an implie
be just as much the intentional creation of
plicit one has forced the rejection of argume
theory." Express rejection occurred as earl
v. *Wheeler*, 373 U.S. 647 (1963), where an
tionable tort in a violation of the statute gov
subpoenas was rejected. Justice Douglas p

> "As respects the creation by the feder
> law rights, it is perhaps needless to st
> the free-wheeling days antedating *Erie*
> (373 U.S. at 651)[8]

[8]Mr. Justice Brennan dissented because he
existence of federal common law torts based on v
ute.

Common law tort theory cannot take
evidence of Congressional intent necessar
private right of action not expressly pro
language. This Court has repeatedly he
private cause of action not expressly pro
less be held to have been created is by fi
Congressional intent to provide one. *Tra*
20; *Amtrak*, 414 U.S. at 457-58; *SIPC*
Cannon, 441 U.S. at 731. The necessity fo
tent" was made plain in *Amtrak*, 414 U.S.
and the "tort theory" was specifically repu
U.S. 560, 568 (1978). As *Cannon*, 441 U
". . . [T]he fact that a federal statute has
person harmed does not automatically giv
of action in favor of that person." Nev
Second Circuit cases cited and relied on
were expressly based on tort theory.[9] Th
where recognizes the demise of the tort t

B. The Majority Erred In Assuming Whether "A Private Cause Of Act CEA Generally, Rather Than Wheth Action For Damages Exists Under Each Separately Considered.

The first error of the majority opinion
any provision of the CEA implied a priv
"a private cause of action existed under
plicable to all violations of any of its prov

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[9] *E.g. Brown* v. *Bullock*, 194 F.Supp. 207, 2
F.2d 415 (2d Cir. 1961) (cited at p. 4049); *F*
World Airways, 229 F.2d 499, 501 (2d Cir.
Fischman v. *Raytheon Mfg. Co.*, 188 F.2d 7
(cited at p. 4047); *Reitmeister* v. *Reitmeister*
Cir. 1947) (cited at p. 4051); *Baird* v. *Frank*
1944) (cited at pp. 4047, 4050).

reasoning, the majority opinion f
1974 "unanimously upheld the im
action *under the CEA*" (p. 4053; e
reversed the District Court.

The fact that none of the pre-197
ity opinion had upheld a private
speculators and non-customers aga
tion 4a, 4b or 9(b) was ignored
majority assumed that if some plai
a violation of some provision of the
anybody else for violating any oth
strange fallacy, the majority opini
before it as whether "there is an im
CEA" (p. 4022 n.1).[10]

This notion is plainly bad law. T
even when an implied private reme
statutory provision, it is not necess
plaintiffs under the same provisio
the statute. *Redington*, *supra*; *Pipe*
Inc., *supra*; *Blue Chip Stamps*, *su*
causes of action may be implied u
customers against their brokers, t
who are not within this protected c
some courts have held that suits
changes under Section 5(a) does
brought by speculators against bro

As a result of this mistaken view
ion never faced up to the real issue

[10]The assumption that the issue was
right of action existed "under the
speaks at least eight times of "*an* im
4057, 4059 n.19, 4060 n.19, 4062, 407
times of "*a* private cause of action" (p
4063 n.21, 4077, 4078, 4080) and at le
of action" (pp. 4051 n.14, 4059, 4060 h

damages against brokers could
tomer speculators because of all
and 9(b).

**C. Because The Text and Legis
And 9(b) Provide No Evide
Create A Cause Of Action
These Provisions, The Maj
ciled With Recent Decision**

Section 4b makes it unlawful
with orders "for or on behalf of a
or defraud . . . such other person
other person any false report . .
other person." (7 U.S.C. §6b) T
the broker cheats or defrauds
section mention parties having n
face of this language, no possibl
tiffs, non-customers of these peti
especial benefit this provision v
field's dissent at 4126-47.

Section 9(b) makes it a felony
the price of any commodity in in
delivery on or subject to the rul
corner . . . any such commodity
Mansfield points out in his disse

> ". . . §9(b), like §4b, does n
> special class of which plain
> the light of the Act's overall
> enacted for the benefit of th

[11] *See Chipser* v. *Kohlmeyer & Co*
1979) ("Section 4b makes it unlawf
or defraud' a *customer* or willfully
or reports to a *customer* in connec
modities exchange.") (Emphasis ad

> consumers of comm
> tors. . . . [T]here is n
> or legislative history
> ed it to be enforced
> remedies provided b
> Act."

Similarly, Section 4a, wh
tion of the burden of
CFTC to set speculative
ty futures contracts and
was surely not intended
whose activities it was di
Fe Industries, Inc., 430
891, 893 (N.D. Ill. 197
mention of any remedy n
Judge Mansfield wrote i

> No court has ever
> under §4a. The secti
> excessive speculatio
> language of the sect
> for the protection of
> gestion that Congres
> action upon any pers
> claimed to be damag
> section. (pp. 4141-4

As with Sections 4b and 9
or alter any civil liabiliti

Because Sections 4a,
Congress' intent at that
mining whether a private
ed, not the intent of Co
575 n.16.[12] *And the 19*

[12]The principle that legis
Congress is well-settled. Se
GTE Sylvania, Inc., 100 S
(Footnot

evidence suggesting th
enforced through priv

Yet even if the legi
considered, it is clear
private cause of action
wrote in his dissent:

> "The legislative h
> runs into hundred
> and debates, fails
> right of action, de
> a Senator to the s

**D. The Majority Er
The Fact That Se
sions Which Are
ment And Other J**

**1. Because Sect
no private ca
when as here
tended to cre**

Sections 4a, 4b an
adopted were punisha
1958, this Court poin
Robinson-Patman Act

> "Section 3 contai
> provisions; in the
> sional intent to t
> familiar principle
> plemented by civi
> *Milk Co.* v. *Carn*

(Footnote continued fro
Community College v.
Mayer & Co. v. Evans, 4
hood of Teamsters v. *U*
SEC v. *Capital Gains*
(1963); *United States* v.

Nashville Milk c
Congress had "n
tion could not be

The principle
today. In *Chrysl*
Court said:

> "In *Cort* v. *
> has rarely i
> statute. . . .

**2. The pr
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The CEA pro
violation of Sec
13(c)), other juc
The CFTC is au
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U.S.C. §9), to su
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members (7 U.S
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Any person com
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§18). See, in addi

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may deem app
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said in *Transa*

> "Yet it is
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> mindedly
> *non* v. *U*
> dissenting

Where, as her
times (in 1968
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proaches certa

**3. The
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right**

Criminal sta
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specific class
them a particu
points out (44

sions relied on by the majority opinion (p. 4052) are either cases dealing with statutes creating express rights (*Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); and *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969)); or cases dealing with statutes creating a duty in favor of the public at large which imply a right of action only on behalf of the United States (*Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967); *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960)). The results in all these cases are thus irrelevant to the consideration of the present case, since neither Section 4a, 4b nor 9(b) creates any *civil* rights or duties.

Cannon went on to point out that "the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large" (441 U.S. at 690 n.13). Criminal statutes making conduct unlawful are among those which simply create duties "for the benefit of the public at large." Here we have another reason why no private right of action should be implied from Sections 4a, 4b and 9(b). As *Cannon* states (441 U.S. at 690 n.13):

> "Not surprisingly, the right-or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action (citing cases)."

Neither Section 4a, 4b nor Section 9(b) contain any such "right-creating" language.

4. The multiple remedies for violations of Sections 4a, 4b and 9(b) make implication of a private cause of action for damages unnecessary to achieve Congress' purposes.

This Court has recently emphasized that an intent to create a private right of action can rarely be found to exist unless it is clear that such a right of action is necessary to "insure the fulfillment of Congress' purposes." *Piper*, 430 U.S. at 41. This Court has further said that "a private cause of action under the anti-fraud

provisions of the Securities Exchange Act should not be implied where it is unnecessary to ensure the fulfillment of Congress' purposes in adopting the Act." *Santa Fe Industries, Inc.*, 430 U.S. at 477. Hence, an important reason for refusing to imply a private cause of action in these cases is that "it is not necessary to make effective the Congressional purpose." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316 (1979).

In view of the numerous other remedies for violations of Sections 4a, 4b and 9(b), no one could seriously contend that a private right of action was *necessary* to ensure the fulfillment of Congress' purposes in enacting those provisions.

E. The Majority Erred In Assuming, Contrary To Fact, That The 1974 Congress "Re-enacted" The Relevant Provisions Of The CEA, And By So Doing Incorporated A "Preceding Judicial Interpretation" Upholding Implied Causes Of Action.

The fundamental premise of the majority opinion was that the 1974 amendments to the CEA constituted a "re-enactment" of the provisions under which private causes of actions are claimed by these plaintiffs:

> "However, what we have developed up to this point is alone sufficient to invoke 'the well-recognized canon of construction that the reenactment of a statute incorporates preceding judicial interpretations.' " (p. 4078)

The majority opinion would apply the presumption arising from a "re-enacted" statute to the post-1974 CEA, and emphasizes its reliance on such "presumption" by asserting that it would require "an exceedingly strong showing of an intention to abolish the private cause of action" (p. 4080; see also p. 4082). Finally, the majority flatly asserts:

> "But the law before us was enacted on October 23, 1974 and 'the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was.' " (p. 4090)

But the "law before us," to the extent that it refers to Sectio 4a, 4b and 9(b), was enacted in 1936, not 1974. Public La 93-463, 88 Stat. 1389, enacted October 23, 1974, was nothi more than a series of *amendments* and *additions* to the CEA, a in no sense was a "re-enactment" of that Act. Most importantl it contained no "re-enactment" of the relevant language of Se tions 4a, 4b and 9(b). Such language is nowhere repeated in t 1974 legislation; nor was the wording on which plaintiffs ba their claims even amended at that time. As the author of t majority opinion admits, "the relevant substantive provisio were left unchanged" in 1974. Thus the "canon of constructio dealing with "re-enactments" has no relevance to these cases.

F. Even If The 1974 Amendments Constituted A "Re-enac ment" Of The Relevant Provisions Of The CEA, The Majo ty Erred In Holding That The Pre-1974 Lower Court De sions Amounted To A "Settled" Interpretation That Priva Causes Of Action For Damages Could Be Implied Under Se tions 4a, 4b And 9(b).

1. The basic premise of the majority's reasoning, th "every" decision prior to 1974 upheld private causes action under the CEA is not true.

The majority opinion asserts that private rights of action unc the CEA had been "universally recognized" (p. 4080) by "the u broken line of decisions upholding a private right of action unc pre-1974 law" (p. 4054). The majority lists eleven cases as cons tuting this "unbroken line" (pp. 4054-55).[13] However in asserti that "every" pre-1974 decision confronting the question h

[13]The extent of the majority's reliance on the supposed unanimity these pre-1974 decisions is emphasized by the fact that the unanimity claimed in at least eleven other places in the majority opinion (pp. 40 4059, 4061, 4072, 4079, 4080, 4094).

found an implied right of action (p. 4079 n.32), the majority c
ion overlooked at least two important decisions to the contra

1. *Rosee* v. *Chicago Board of Trade*, 311 F.2d 524
Cir. 1963).

A member of the Board of Trade brought suit because o
suspension from trading, but his suit was dismissed for "wa
jurisdiction under . . . the Commodity Exchange Act" (311
at 525). The Court of Appeals explained:

> "The Act proscribes certain practices by members of a b
> or contract market and provides the sanction of crim
> penalties. The statute does not expressly provide for
> enforcement of any correlative rights corresponding to
> statutory duties." (311 F.2d at 527)

The court concluded that "Appellant has failed to establish
. . . the Commodity Exchange Act provides a civil remedy
review of arbitration and disciplinary proceedings by the Boa
Trade" (311 F.2d at 528).

The Court specifically pointed out that the Board's "pros
tion of fraudulent contracts creates public rights, as is manife
by criminal sanctions," but that "in this respect" the CEA di
from the Railway Labor Act which created rights for the be
of specific parties (311 F.2d at 527-28). *Rosee* thus denied
the criminal provisions of the CEA could imply a private cau
action.

2. *Insdorf* v. *Chicago Mercantile Exchange*, No. 61 C
(N.D. Ill. Oct. 18, 1965), *aff'd without opinion*, (7th
Sept. 13, 1966).

Here a speculator alleged that the Exchange permitted va
onion traders to hold positions in excess of daily trading li
and also charged the Exchange with other failures to enforc
rules and to perform its duties under the CEA. The complain
serted claims under Section 4 of the Clayton Act, the CEA

the common law. A motion to dismiss relying, *inter ali*
ville Milk and *Rosee* was granted by the district
Seventh Circuit dismissed the appeal by order becaus
ment from which this appeal was taken is suppo
record."

* * *

The number of times suits based on asserted priva
actions under the CEA may have been denied by dis
without opinion cannot of course be ascertained from
To assert, as the majority opinion does, that "ever
case" (p. 4079 n.32) upheld a right of action is not on
in face of *Rosee* and *Insdorf*, but in any event "lac
empirical basis," to use Judge Friendly's phrase (p. 4

**2. The pre-1974 cases did not establish a "settl
interpretation that rights of action against I
be implied under either Section 4a, 4b or 9(b
non-customer speculators since not one of
held.**

Five of the eleven cases relied on by the majority
hold" a right of action under the CEA.[14] In *Gould* t
denying defendant's motion to dismiss for want of
did not decide whether a cause of action existed as the
not before it. *Hecht* involved a charge that a broker "
account in violation of Section 10(b) of the Securitie
Act. While the court remarked *obiter* that a cause of
the CEA might lie, since the account included comm

[14] *Gould* v. *Barnes Brokerage Co.*, 345 F.Supp. 294 (N.D
Hecht v. *Harris, Upham & Co.*, 283 F.Supp. 417 (N.D
modified, 430 F.2d 1202 (9th Cir. 1970); *Booth* v. *Peav*
modity Services, 430 F.2d 132 (8th Cir. 1970); *Johnson*
F.Supp. 764 (S.D.N.Y. 1972); *Seligson* v. *New York*
change, 378 F.Supp. 1076 (S.D.N.Y. 1974), *aff'd. sub n*
New York Produce Exchange, 550 F.2d 762 (2d Cir.), *cer*
U.S. 823 (1977).

actions, no such claim was considered and both the t
appellate court held that the "commodity losses
recoverable by plaintiff *as such*" (283 F.Supp. at 44
1212). In *Booth* the court affirmed a directed verd
dant for lack of evidence of violation of the CEA. Ir
court dismissed a suit by a customer against her
Section 4b for failure to comply with Rule 23.1 of Fe
Seligson the district court granted the Exchange su
ment on plaintiff's claim under Section 5(d). The
however, expressed the opinion that a cause of actio
citing *Deaktor*, *infra*. The Court of Appeals said nc
subject.[15]

Four of the remaining six cases upheld rights of
frauded customers against their brokers under Secti
the decision specifically upon the fact that defraud
were a class "especially" protected by Section 4b.[16] *G*
Hentz & Co., 265 F.Supp. 440 (N.D. Ill. 1967), the
decision upholding a cause of action for damages u
4b, was a class action by customers against their brok
primarily violations of Section 10b of the Securities E
(265 F.Supp. at 443), but also asserting a claim und
of the CEA. The court distinguished *Rosee* on the

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[15]In the last four of these cases, *obiter dicta* asserted tha
tion under the CEA existed, citing *Goodman*, *infra*, or it
judicial construction of a statute is not "settled" by mer
especially when based solely on wrongly decided preced
more, all but the last of these five cases were suits by c
tomers against their broker, so they could not be authorit
ence of implied causes of action in favor of non-customer
broker-petitioners. The fifth case (*Seligson*) did not invo
tion 4a, 4b or 9(b).

[16]*Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D.
derson v. *Francis I. duPont & Co.*, 291 F.Supp. 705 (D.
Arnold v. *Bache & Co., Inc.*, 377 F.Supp. 61 (M.D. F
McCurnin v. *Kohlmeyer & Co.*, 340 F.Supp. 1338 (E.D.

Rosee "was not a defrauded investor, as in the
ing out that defrauded customers "fall directl
persons Congress sought to protect by enact
the Commodities Exchange Act."[17] *Goodman*
soundly reasoned, would stand for no more th
customer may sue his broker for violation of

The remaining two cases relied on by t
relevant to the charges against these petitione
rely solely on the repudiated tort theory of li
held, relying solely on *Goodman*, that egg pro
tors such as plaintiffs here, could *enjoin* a pe
inaccurate market information in violation of
9(b) not relevant to the present case. The cou
that plaintiffs as producers "are within the cl
tended to protect from false, or misleading, o
rate reports" (311 F.Supp. at 1384); but the o
was an injunction and not an action for dam

In *Deaktor* two cases brought against an
CEA were consolidated. One alleged violati

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[17]This disposes of the majority opinion's assertio
eleven cases] stressed the broker-customer relatio
more, in its *dicta* in *Johnson* v. *Espey*, *supra*, the
6b . . . makes it unlawful for any member of a cor
or defraud or attempt to cheat or defraud' *person*
i.e. customers. (341 F.Supp. at 766; emphasis ad

[18]*United Egg Producers* v. *Bauer Int'l Corp.*, 3
N.Y. 1970); *Deaktor* v. *L. D. Schreiber & Co.*, 4
rev'd. sub nom. Chicago Mercantile Exchange v.
(1973).

[19]The majority opinion is mistaken (p. 4058 n.
existence of an implied cause of action for injun
includes a right to collect damages. In *Transan*
that, while a suit to rescind and for restitution c
statutory provision declaring certain agreemen
damage action was thereby implied.

and the other alleged violation of Section 9
peals, falling into the same error as the
framed the question overbroadly as: "whet
tions are allowable under the Commodity
stead of the questions (1) whether a priv
damages could be implied under Sectio
separately considered and (2) if so, in wh
such a right of action vested? The Court o
its error by answering affirmatively the ir
tion solely on the authority of the *Restate*
precedents afforded by *Goodman* and its
534), not one of which dealt with Section
which (*United Egg*) had considered wheth
a private remedy.

The *Deaktor* decision was reversed by th
that the entire matter should have been
Commodity Exchange Commission becau
and application of the Act" were issues to
instance" by the Commission (414 U.S. at
means "assumed" that "plaintiffs' clain
federal court," as the majority opinion as

Even if the issues in these cases had
eleven pre-1974 cases, those cases would
judicial interpretation since each was base
ated theory of tort liability. *Goodman* hel
cause of action for damages against their
violation of Section 4b on the principle set
the *Restatement of Torts* (265 F.Supp. a
rationalizes its result solely on the theory
standard of conduct set out in Section [4b
plaintiffs, as members of the class Congres
have a federal civil remedy. . . ." (265 F

man, applying the repudiated "tort t
ly mistaken view that:

> "Implied rights of action are n
> language which affirmatively ir
> ed. On the contrary, they are i
> evidences a contrary intention.

This, of course, violates the princip
considerations, that an implied right
evidence of a Congressional intent to
ly Congress can legislate.

Every one of the other ten cases wh
"[t]he unbroken line of decisions up
under pre-1974 law" relied upon the
man. These cases, therefore, are
precedential inbreeding." *U.S. Ind*
142, 150 (3d Cir. 1976).[21]

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[20]This was quoted from the *dissent* in
647 (1963) and was in turn a quote fron
man should have recognized that the tor
since it specifically relied on the dissent i
find an actionable tort in a violation of t
subpoenas was rejected. Mr. Justice Bre
violation of a federal statute could still g
of action" (373 U.S. at 657) despite *E*
ruling. By relying on the dissent in *W*
chose a rationale which had already be

[21]As Judge Mansfield wrote in his dis

> "*Goodman* . . . is significant not bec
> it is the case on which all of the la
> cause of action summarily relied."

Thus, *Goodman* was decided in 1967; *I*
Goodman, 283 F.Supp. at 437; *Ander*
Goodman, 291 F.Supp. at 710; *Booth*, 1
man, 430 F.2d at 133; *United Egg*, 1970
311 F.Supp. at 1384; *Johnson*, 1972, is b
Booth, and *Hecht*, 341 F.Supp. at 766

(Footnote continued

The eleven cases relied on by th
did not "settle" anything relevant
list omits persuasive decisions de
private rights; the pre-1974 cases
imous" as the majority opinion p
with the issue at all. Four conta
None advanced a rationale which
face of *Wheeldin* and *Amtrak*. N
statement by this Court. Only one
was reversed because the court w
had no initial jurisdiction. An ea
had denied the existence of an im
gle one of these cases attempte
Congress or to apply the tests lai
decisions. To the extent a rational
is the long-repudiated test of the

Sections 4a, 4b and 9(b) were e
if the state of the law in 1974 we
of 1936 enactments, the pre-1974
way provide a "settled" judicial i
of action existed under Section 4a
tomers of brokers whose interest
tors. *Not a single case had so he*

**G. Even If The Actions Of T
Relevant To The Ascertainm
Congress In Enacting Sectio**

(Footnote continued from previous
man, Booth and *Hecht*, 345 F.Supp
upon *Goodman, Anderson*, and *Boo*
1973, is based upon *Goodman, And*
McCurnin, 377 F.Supp. at 65; *Deak*
Anderson, Booth, United Egg, Johns
and *Seligson*, 1974, is based solely u
84.

Erred In Holding T
Decided That A Settl
nized Implied Rights
Sections And Intended

Even if the pre-1974 ca
sufficient in numbers, suffi
ly reasoned to support a cl
law, the next steps in th
Congress (1) knew about
definite and conclusive int
them as upholding rights
present cases, and (4) act
speculations, and are all r

I. No clear evidenc
Congress believe
causes of action
erroneous pre-19
and consciously
those erroneous

In support of its asserti
1974] Congress knew the
action and did nothing to
ion cites a small numbe
private actions. See Judge
assert that these opinio
Congress to assume that s
particularly that they spe
and 9(b) in favor of such
ligence of Congress.

But, if true, this means
the pre-1974 interpretati
predicated on the already
presumption in which the

presumed to have been a
Amtrak and to have kno
the majority opinion we
"settled" the issue.

**2. Congress must
Securities Acts
damages were i
sions in those A**

The majority opinion a
in assuming" that the dec
private rights of action '
CEA" (p. 4050). The ma
the fact that from the 1
spread, indeed almost ge
action for damages unc
Exchange Act" (p. 4047

Actually Congress had
of the Securities Acts cas
is *J. I. Case Co.* v. *Borak*,
ty opinion tells us, "domi

> "It appears clear th
> to bring suit for vio
> specifically grants t
> tion over 'all suits in
> force any liability o
> at 430-31).

Borak thus regarded Sec
tent to provide private ri
created under the Act.'
provision in the CEA is,
intent on the part of Co
under the CEA.[22] Th

[22]Nevertheless, the argur
the Securities Acts and the
ty opinion (pp. 4053, 4094

Court, in holding
statute there at is
tional language: '
. . . contains no ge
Moreover, in *Tra*
that the omission
with an intent on
action for damag
any general grant

**3. That the
private
ments w**

The 1974 Cong
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the broker-petitic
Congress provide
obtaining reparat
tion of any provi
provision is persua
such persons alrea
action did exist, t
necessary and me

Furthermore, th
existence of impl
CEA provides a t
under the Act. If a
ty would be shat
which would vary
Mayer & Co. v. *E*
implied private ca
requirement that
"before any form

requirement ex
CFTC may rev
in private actio
law as part of
futures trading

**4. The I
which
dama**

In 1974, Co
enact, a bill wh
to recover si
Damages" S.2
Court wrote th
ed a private
Congress did n
field's dissent a

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[27]This Court h
tant protection a
tion. *Blue Chip*

CONCLUSION

These cases raise important questions of the scope and construction of an important federal statute. The numerous decisions of the lower courts are in serious conflict; the issues raised should be resolved by this Court at this time. The joint petition for a writ of certiorari should be granted.[24]

Respectfully submitted,

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[24]Although the judgment which petitioners request this Court to review is nonfinal (the Court of Appeals having reversed an order granting petitioners' motions for summary judgment), this fact should not interfere with the granting of *certiorari* in view of the importance of the questions presented in this Petition and the Petition in *Curran*. This Petition raises important issues of law which are fundamental to the further conduct of these cases. This Court has granted *certiorari* in other cases under similar circumstances where those cases raised issues of equal importance. *E.g.*, *Transamerica*, *supra*; *Redington*, *supra*; *Blue Chip Stamps*, *supra*; Cf. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975).

APPENDIX

OPINION OF THE U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 402, 403, 404—September Term, 1979

(Argued January 16, 1980 Decided July 8, 1980)

Docket Nos. 79-7402, 79-7464, 79-7482

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—v.—

JOHN RICHARD SIMPLOT, J.R. SIMPLOT & CO., SIMPLOT PRODUCTS CO., INC., SIMPLOT INDUSTRIES, INC., SIMTAG FARMS, INC., PETER J. TAGGARES, P. J. TAGGARES & CO., HENRY A. POLLACK, HARVEY B. POLLACK, HARVEY B. POLLACK COMPANY, GERALD RAFFERTY, PRESSNER TRADING CORP., BENJAMIN PRESSNER, STEPHEN SUNDHEIMER, JULES NORDLIGHT, EDELSTEIN & CO., INC., CHARLES EDELSTEIN, ROBERT EDELSTEIN, MURIAL EDELSTEIN, MEIERFELD & COMPANY, INC., GILBERT MEIERFELD, DAVID MEIERFELD, ROBERT REARDON, F.J. REARDON, INC., HAROLD COLLINS, CASPAR MAYERSON, LYNNEWOOD EXPORTING COMPANY, ALEX SINCLAIR, MANNING STOLLER, HORNBLOWER & WEEKS-HEMPHILL, NOYES INC., MFX COMMODITIES, INC., DONALD SILVER, DUANE SOUTH, KENNETH RAMM, A & B FARMING INC., HUGH GLENN, GEARHEART FARMING INC., EDWARD MCKAY, "JOHN" HUMPHREYS, FRANK FULLMER,

Defendants

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., H
COMMODITIES, INC., THOMPSON & MCKINNON, A
CLOSS, KOHLMEYER, INC., NEW YORK MERC
EXCHANGE, RICHARD B. LEVINE, HOWARD G
ALFRED PENNISI,

Defendants-App

INCOMCO,

Plaintiff-App

—v.—

WAYNE COUNTY PRODUCE CO., and HAROLD COI

Defen

NEW YORK MERCANTILE EXCHANGE,

Defendant-Ap

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTE
WILLARD C. CHINER, EUGENE P. WEISMEN, R
WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMS
THEODORE BRINEK, CAPGAIN HOLDINGS, INC., an
ROMMINGER, individually and on behalf of all p
similarly situated,

Plaintiffs-Appe

—v.—

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROK
CO. OF ST. LOUIS, INC., PRESSNER TRADING

JACK RICHARD SIMPLOT, J.R. SIMPLOT CO., INDUSTRIES, INC., PETER J. TAGGARES, P.J. T CO., C.L. OTTER, SIMTAG FARMS, KENNETH R & B FARMS, INC., HUGH V. GLENN, GE FARMING, INC. and ED MCKAY,

Defe

HEINOLD COMMODITIES, INC., THOMPSON & MCK AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Ap

Before:

FRIENDLY, MANSFIELD and KEARSE,
Circuit

Appeal from an order of the District Court Southern District of New York, Lloyd F. Ma *Judge*, 470 F.Supp. 1256 (1979), granting summary judgment to the New York M Exchange and three futures commission me defendants in three consolidated actions plaintiffs claimed damages arising out of the de sellers of the May 1976 Maine potato futures c on the ground that there is no private cause for damages under the Commodity Exchange U.S.C. §§ 1-19.

Reversed.

LEONARD TOBOROFF, Esq., Ne
(Robson & Toboroff, New
for Plaintiffs-Appellants
Philip Smith and Incomc

POMERANTZ, LEVY, HAUDEK &
York, N.Y. and
HOLLINSHEAD and MENDELSON
Pa., *for Class Plaintiffs-A*

WILLIAM E. HEGARTY, Esq., Ne
(Cahill Gordon & Reindel
N.Y., Charles Platto, Es
Leight, Esq., Of Counsel)
REIN, MOUND & COTTON, New
(Maurice Mound, Esq., Of
Defendants-Appellees Neu
cantile Exchange, Richar
Howard Gabler and Alfre

LAWRENCE H. HUNT, Esq.,
(Sidley & Austin, Chicago
DEWEY, BALLANTINE, BUSHBY
WOOD, New York, N.Y. *f*
Appellee Heinold Commod

W. STANLEY WALCH, Esq., St
souri (Thompson & Mitch
Missouri, Gerard K. Sandv
Kenton E. Knickmeyer, E
sel) *for Defendant-Appe*
Brokerage Co. of St. Loui

HALL, MCNICHOL, HAMILTON, C
RAY, New York, N.Y. *fo*
Appellee Thomson McKi
closs Kohlmeyer Inc.

MARK D. YOUNG, Esq., W
(John G. Gaine, General
Nicolette, Deputy Gener
Gregory C. Glynn, As
Counsel, Washington, D.
for Amicus Curiae Com
Trading Commission.

FRIENDLY, Circuit Judge:

Plaintiffs in three consolidated action
Court for the Southern District of Ne
from an order of Judge, now Chief Jud
470 F.Supp. 1256 (1979), granting ap
for partial summary judgment. The co
the complaints all claims based on
Exchange Act, (CEA), 7 U.S.C. §§ 1-19
1974, as distinguished from other cl
antitrust laws. The actions were to r
allegedly suffered by the plaintiffs as
Judge MacMahon characterized as

> the much publicized default in May
> potato futures contracts, when the
> 1,000 contracts failed to deliver
> 50,000,000 pounds of potatoes, r
> largest default in the history
> futures trading in this country.
> 1258 (footnote omitted).

The basis for the court's order was
cause of action exists for breach of the
important issue has divided the
including those within our circuit, we

to discuss it in some detail.[1] We
did the district court, to begin w
the nature of the commodity fut

I. COMMODITY FUTURE

A commodity futures contract
executory agreement for the pur
particular commodity. The sell
commits himself to deliver the c
date in the future, while the bu
then to accept delivery and pay
Bromberg & Lowenfels, Securities
ties Fraud § 4.6 (421)(1979); H. R.
Cong., 2d Sess. 130 (1974). Every
contract is standardized except pr
contract involved in this case, t
potato futures contract, is for 50,
grown potatoes of a specified qual
specified points in cars of the
Railroad, between May 7 and May
is the only variable, negotiations
and the agreed prices can be spe

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1 The length of our treatment, particu
nature of the Commodities Futures Mar
of congressional regulation in Part III, i
that when the case was argued and for
opinion was prepared, no court of appeal
and we anticipated being the first to
decided May 12, 1980, a divided panel
the Sixth Circuit reached the issue *sua*
and succinct opinion, held, as we do, on
that there is an implied private right
Curran v. *Merrill Lynch, Pierce, Fenn*
1300, SRLR (BNA) G-1 (May 12, 1980)
dissent, *Curran* involved a suit by a cu
court did not limit its reasoning to th

other traders. Standardization al
fungible. Original sellers and
offset their positions by acquiri
either paying or gaining any p
Rep. No. 93-975, *supra*, at 130.

The person who has sold a
someone committed to deliver
future, is said to be in a "short
someone committed to accept de
rare case, however, in which actu
pursuant to a futures contract
instances, the short and the lon
positions prior to the close of tr
futures contract. Although the
done is routinely referred to as f
contracts are not "traded" in th
word. Rather they are formed
Genealogy and Genetics of "C
Commodity for Future Deliver
Exchange Act, 27 Emory L. J.
person seeking to liquidate his

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2 See H. R. Rep. No. 93-975, *supra*
futures contracts culminate in delive
of Futures Trading 41 (1977) (less tha
investor nor the person using the futu
position in the market for the actua
delivery. H. R. Rep. N. 93-975, *supra*,
Inc. v. *Freeman*, 311 F.2d 52, 55-
Delivery Requirement: An Illusory B
tion in Commodity Exchanges 73 Ya

In occasional instances, however, pe
an alternative market for the physic
93-975, *supra*, at 132. Delivery is ma
by transfer of warehouse receipts or ri
then transported according to the
Cargill, Inc. v. *Hardin*, 452 F.2d 11
denied, 406 U.S. 932 (1972).

form an opposite contra
that his obligations unde
each other. Thus, a short
the commodity must purc
contracts; a long must s
contracts. Money is m
differential between the
offsetting transaction. If
declined, usually because
cating a drop in the price
will realize a profit; if th
long will realize a profit
452 F.2d 1154, 1157 (8
U.S. 932 (1972). Futures
Since money is made
contract prices, and ever
short, every gain can be
loss. See Melamed, *The*
Futures Exchange: A Cr
Transaction Process, 6 Ho
(1977).

The mechanics of the c
the roles of the various p
by tracing a typical trans
to invest in the futures
commission merchant" (F
Commodity Exchange Act
"engaged in soliciting or
purchase or sale of any c
. . . on . . . any contra
U.S.C. § 2, and they are r
Futures Trading Commi
demand a "margin" paym
is simply a security depo
adverse price movements

based upon the amount
a day or two; when the
will call the customer
margin is generally only
of the contract. See Mel
at 167 & n.41. FCM's
customer's business.

The FCM relays its
"floor brokers" trading
stands on the outside of
are gathered other p
contract. Some of the
behalf of customers, wh
account. Contracts are
broker with an order wil
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signals. Someone willing
across the pit in similar
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transaction and feed the
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event, had an opportuni
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the FCM, who informs

When two traders ha
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comes into play. The c
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the interchangeability
ling of positions. H. R.
S. Rep. No. 93-1131,
Cargill, Inc. v. *Hardin*,
FCM's are clearinghous

must deal through
FCM's as princip
demands margin p
house requires FC
close of every tradi
the FCM has sust
trading is computed
accordingly. Melam
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Generally speakin
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of transferring risks
R. Rep. No. 93-975
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17 C.F.R. § 1.3(z). T
against declining p
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No. 93-975, *supra*,
supra, 452 F.2d at
at 171-73. The bene
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business, he is ab
with consequent
Rep. No. 93-975,
93-1131, *supra*,
Regulation of t
Harv. J. Legis. 3

The system w
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Trading: Specula
Rev. 27, 32 (197
F.2d at 1158.
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> The principa
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3 Johnston, *Unde*
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II. THE ALLEGED FACTS AND THE PROCEEDINGS BELOW

The facts alleged in the three complaints here before us are broadly as follows:[4]

John Richard Simplot is an Idaho potato entrepreneur who controls J. R. Simplot and Co., Simplot Products Co., Inc., and Simplot Industries, Inc. These corporations are responsible for the processing of approximately 50% of all Idaho potato products processed and sold in the United States. Peter J. Taggares is a Washington potato entrepreneur. He and his company, P. J. Taggares Co., process approximately 30% of all the Washington potatoes processed and sold in this country. Simplot and Taggares are equal partners in the ownership of Simtag Farms, a large farm in the State of Washington for the growing and warehousing of potatoes. Together Simplot, Taggares, and the companies they control are the largest purchasers of potatoes throughout the western potato region of Washington, Idaho and Oregon.

According to the complaints, Simplot, Taggares, and the companies controlled by them, together with numerous co-conspirators, embarked in the spring of 1976 on a conspiracy to depress the price of the May 1976 Maine potato futures contract traded on the floor of the New York Mercantile Exchange (the "short conspiracy"). As stated by one of the complaints, "[b]y virtue of their position in the potato processing field and the quantity of potatoes purchased by them, [the

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4 We say here once and for all that our statement, in large measure, is simply what the plaintiffs contend to be the facts and is not to be read as one of facts found. Accordingly we will generally dispense with use of words such as "allegedly", "asserted" and "claimed".

conspirators] would be in a position to control the prices paid for potatoes but for the existence of the Exchange and the activity . . . in buying and selling potato futures contracts." Simplot had encountered difficulties in the course of his customary negotiations with the Idaho Potato Growers Association, because the IPGA believed that the price of potatoes, including Maine potatoes, would be much higher than what Simplot was offering. Futures prices supported this view. A report issued on April 13, 1976 by the United States Department of Agriculture indicated that total potato stocks were down 11%, and that Maine stocks totalled only 7.4 million cwt. compared with 13.0 million cwt. on hand the previous year. An earlier report issued in August 1975 estimated that national potato acreage would be down 8% from the previous year with an even greater drop in Maine. The effect of this latter report, and other generally available information, was to drive the price of the May 1976 Maine contract from $9.75 per cwt. to a record high of $19.15 per cwt. by October 3, 1975. The activities of the short conspirators were designed to counteract the impact of these reports and other market information and rumors tending to raise the price of Maine futures. A decline in the price of potato futures would suggest to those dealing in the cash market, such as the IPGA, that supplies of Maine potatoes would be greater than earlier anticipated, and that prices in spot transactions or negotiations for all potatoes should correspondingly recede.

The primary means by which the short conspirators sought to depress the futures price was the accumulation of a large net short position in the May contract. The conspirators allegedly agreed to sell a large number

of contracts short and to refuse to liquidate these shorts at a price higher than that agreed among themselves and, if necessary, to default on the obligation to make delivery on all unliquidated contracts. Such short purchases would give the impression of the existence of a large supply of deliverable Maine potatoes and drive down the price of the contract.

Simplot made $1 million available to Simtag Farms, which Simtag used to open a credit balance on March 29, 1976, with Pressner Trading Corp., a member of the New York Mercantile Exchange (the Exchange or NYME), for the purpose of buying and maintaining short positions in the May contract. At the same time, Simplot, Taggares and their other companies also began to accumulate a large number of short contracts. The brokers through which the conspirators acquired their positions included Clayton Brokerage Co. of St. Louis, Inc. (Clayton), Heinold Commodities, Inc. (Heinold), and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc. (Thompson). These three brokerage firms were, like Pressner Trading, clearing members of the Exchange and appropriately registered with the CFTC. The firms allegedly knew, or should have known, that their customers neither intended to nor would be able to cover the large number of short positions the brokers acquired for them.

On May 4, 1976, Simplot and Taggares were warned by the CFTC that it was aware of their large short position and that price manipulation was a violation of the Commodity Exchange Act. The telegram concluded that although this "is not an allegation of price manipulation, if prices of the May 1976 potato future . . . should become artificial during liquidation due to

your action or inaction, we will consider whethe
and your firm should be charged with price mar
tion under the Commodity Exchange Act." In th
of this warning, and the impending close of trad
May 7, the conspirators not only failed to take st
liquidate their large short position but ac
increased it, again with the help and support
named brokerage firms. On the last day of tradin
consolidated all the short positions they control
the hands of Pressner. Clayton, Thompson and H
knowingly acquiesced in this consolidation desig
concentrate the force of the manipulation.

In addition to the accumulation of a large net
position which they refused to liquidate at highe
an agreed price, the conspirators also all
manipulated the futures price by shipping
quantities of unsold Idaho potatoes to the
markets for immediate sale at the going price. T
of such so-called "roller cars", railroad cars of po
shipped although there is no pre-determined
tends to depress the market price, and thus
futures prices.

Simplot and Taggares were not the only
manipulating the price of the May future. A
group of eastern conspirators thought they coul
the western producers at their own game.
Collins and Casper Mayrsohn are Maine
merchants and traders in Maine futures. MFX
modities, Inc., with Donald Silver as its presider
foreign corporation engaged in business as a FCM
group learned of the conspiracy of Simplo
Taggares and conspired to squeeze them. Pursu
this conspiracy (the "long conspiracy"), the "long"
purchased as many contracts as it could, and t

the same time maneuvered to tie up the cash market so that the shorts could not make delive longs reasoned that if the shorts had no ac deliverable potatoes, the longs would be able to the price the shorts would have to pay to liquida contracts. The main way in which the longs tied cash markets was by tying up all of the rail car Bangor & Aroostook Railroad, which alone deliver potatoes to satisfy May futures contract was done by using the cars for phony export shi and leaving them loaded or only partially u when they reached appropriate destinations.

Neither the longs nor the shorts would give in other. The shorts refused to liquidate their posi buying offsetting long contracts at higher th price agreed among them; the longs refused t down to the unreasonably low price demanded shorts. At the end of trading on May 7, th conspirators controlled 1893 open short positio long conspirators controlled 911 open long po There are usually only approximately 20 contracts at the end of trading on the May future.

The plaintiffs were caught in the middle b these two competing conspiracies. Neil Leist is licensed member of the Exchange engaged business of trading commodities and futures own account. Incomco, a partnership, is a duly FCM. Philip Smith is Incomco's managing partn class action plaintiffs are traders and dealers re ing all persons "who held a net long posi Contracts and who liquidated their long position contract between April 13, 1976 and the trading on the Exchange on May 7, 1976."

On the basis of the same sort of inf
motivated Simplot and Taggares to con
the price of the contract, plaintiffs bel
an investment opportunity on the lo
contract. If there was going to be
deliverable Maine round whites, thos
deliver potatoes at a set price might wel
to be under what the potatoes were wo
would then have to sustain a loss, eithe
potatoes in the cash market for the h
delivering them for the lower futures co
by purchasing an offsetting long positi
the long position should have gone
shortage, so that the shorts would lose
in liquidating. The shorts' loss would be
and it is this gain which the plaintiffs s
by their investment.

All the plaintiffs invested heavily on
the May contract. In addition, Incom
position in the cash market. It had acc
pounds of Maine potatoes delivered to
the March futures contract, and plann
potatoes to those short the May contr
supplies to satisfy their delivery obligat
ing a cash market shortage, Incomco ex
potatoes at a handsome premium.

Because of the conspiracies, howeve
only did not realize the gains they cl
have had in an unmanipulated mark
losses. The short conspirators continue
short positions when they should have
liquidate by purchasing long contracts
and refused to liquidate above a set pric
the unnaturally falling price, the plaint

out of the market at a loss. Bec
conspirators had successfully tied up all
of the Bangor & Aroostook, Incomco
deliver its warehoused potatoes to p
delivery to fulfill short contracts. As the
set in, the 1,500,000 pounds of potatoes
and Incomco's total investment was los

The Exchange allegedly figured in this
from the start. In March, Richard Levi
the Exchange, told plaintiff Leist that
was investigating the large number of o
the May contract. On April 28, two m
CFTC eastern region office, Howard B
Marshall Horn, met with Levine and H
vice-president of the Exchange, to expre
over the problems developing with the
Levine recognized the problem and exp
that Simplot might be trying to create
the contract. A second meeting took
later, at which Bodenhamer told Le
Commissioners felt that "the Exchan
more action than less to bring about
tions of the maturing futures."

Levine did not report these meetings
to the Exchange's Board of Governors
close of trading on the May contract.
Exchange knew, or should have know
short and the long conspiracies, it too
prevent manipulation of the market.
failed to declare an emergency situation
rules to facilitate orderly liquidation, an
had closed, failed to take appropriate
permitting delivery by truck or buyi
cover the default of the shorts.

The complaint in *Leist* v. *Sim*
District Court for the Southern Di
September 30, 1976. Count I, dire
conspirators and their brokers
activities of the group constituted
§§ 1-13 and, more specifically, th
employed manipulative devices
violation of 7 U.S.C. § 13, which
felony, and of rules promulgat
addition to naming the brokers as
specifically alleged that they "fa
enter liquidating orders" for th
prior to the close of trading "ev
that such short positions could no
there would be a default if the acc
out", permitted the short sale
cooperated in making such short
knew or should have known tha
intend to and would be unable
positions." Count II of the comp
violations of the Sherman Anti
§§ 1, 2, which are not subject t
Count III was directed against t
describing the facts outlined abo
such conduct violated 7 U.S.C. §
directed against the Exchange a
repeating the earlier general al
short conspirators, the complain
defendants "negligently failed to
market for trading in Maine Futu
duties imposed upon them under
Act." The Exchange was also ch
report the various violations alle

and with failing to direct the
orders for the account of mer
positions prior to the close of tr
Exchange officials knew or shoul
sellers would not and could not
positions remained open.

The complaint in *Incomco* v.
Exchange was filed in the Di
Southern District of New York o
complaint was directed at the lon
Exchange, "acting separately and
the long conspirators, for "block
railroad cars, thereby creatin
manipulative railroad car shorta
Commodity Exchange Act, and
for failing to follow its own regu
buy in the cash market for the
sellers so that outstanding obliga
As in *Leist* v. *Simplot*, plaint
antitrust charge.

The complaint in *National Sup*
Mercantile Exchange was filed in
the Southern District of New Y
After consolidation with other ac
this class action complaint charge
the short sellers described above
ble provisions of the Commodity
manipulative force which artific
of the Contract." Count II cha
with exceeding position and tra
CFTC in 17 C.F.R. § 150.10. C
against the brokers for the short

with violating Exchange l
have liquidating orders pl
should have known that
deliver potatoes, permittin
position and trading limit
failing to report these and
regulations, and Exchange
which they knew or sho
generally charged that the
intent of short Sellers t
Contract acquiesced and/o
Short Sellers." Count VI w
charging that it failed a
concealed violations of the
rules; failed and neglecte
orders be entered with re
Exchange knew or should
generally failed and neglec

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5 This reads as follows:

44.02-FINAL DAY OF TR

(a) On the final day of tr
the responsibility of each
position to fulfill his con
contract by prescribed not
order entered on the Exch
before the time established
month. All such orders sh
prior to the expiration of

(b) On the final day of t
no time limit or contingen
will not be expected to ass
orders placed later than 15

(c) Cancellations that re
hour prior to the time tra
day of trading in an expi
problems and hence will
customer.

contract market; and fail
due care to halt manip
actions, all claiming e
punitive damages, were c

After answers had been
had been had, one phas
attention of this court,
New York Mercantile Ex
1979), three brokers, Cla
and the Exchange and Ex
different actions for judg
Fed. R. Civ. P. 12(c) or,
summary judgment unde
he believed that all the
material outside the plead
motions under Rule 5
dispositive reasons so far
the Commodity Exchange
raised by the Exchange,
Thompson, seem to have
could have been raised as
been filed two years ear
issued on May 29, 197
MacMahon held that th
action for damages und
Act, and granted summa
moving defendants on t
under that Act.[6] Partial
under Fed. R. Civ. P. 5
defendants, and the plain

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6 For a precise statement o
470 F.Supp. at 1257 n.1, 1

III. THE HI

COMMOI

Although our ir
modity Exchange
useful at this po
Congressional regu

The first effort
Trading Act, 42 S
basic pattern of al
trading on central
and control of th
levied a tax on all
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Agriculture was
trade as a "contrac
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§ 5(d), 42 Stat.
virtually unchange
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private right of a
also empowered
Secretary of Agri
the Attorney Ge
designation of any
the conditions of
and to preclude
attempting to m
designated contra
Failure to pay th
records made the
a fine of up to $1
one year. § 10, 4

The Future T
unconstitutional
Wallace, 259
immediately and
Stat. 998 (192
deleted, and Co
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in futures contr
§ 4, 42 Stat. 99
of the 1921 act
penalties now ac
the failure to p
added, § 3, 42 S
over virtually u
U.S.C. § 5. The
exercise of the
Olsen, 262 U.S.
established the
designated exch
controlling desig
markets. The
violations was a

Major addition
by the Commodi
Coverage was
commodities suc
4a was added,
Secretary of Ag
Attorney Genera
tive trading.[7] H

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7 This provision

(1) Excessiv
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C.F.R. § 15
Stat. 1493,

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present form.[8] New section 4d required the registration of FCM's and section 4e of floor brokers, while section 4g provided for the suspension or revocation of these registrations for violation of the Act or rules adopted thereunder. Section 5a added new duties of reporting for contract markets and some substantive obligations as well. Fines and imprisonment sanctions were extended to cover violations of the newly enacted provisions as well as old § 4, and were also applied to

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8 This provision currently reads as follows:

> It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
>
> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or exchange of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or
>
> (D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

anyone attempting to manipulate or manipulating the price of any commodity. 49 Stat. 1501.

By 1936, then, the major provisions which assertedly form the bases of the implied right of action against the FCM's, the trading limit, antifraud, and antimanipulation provisions, were already in place. One of the two additional provisions allegedly affording the basis for an action against the Exchange, § 5(d), had been law since 1921 and the other, § 5a(8), would be added in 1968.

The 1968 amendments, 82 Stat. 26, extended regulation to new commodities such as live cattle and pork bellies. The amendments added § 5a(8), as noted above, requiring a contract market to enforce all of its rules not disapproved by the Secretary of Agriculture.[9] Corresponding § 8a(7) was added empowering the Secretary to disapprove rules which violate or will violate the act or regulations. The penalty provision was altered somewhat, making FCM embezzlement and price manipulation felonies instead of misdemeanors, with a maximum prison term of five years instead of one. 82 Stat. 33-34. Section 6b was added, granting the Secretary the power to issue cease and desist orders against a contract market not enforcing its rules or violating the act. 82 Stat. 31-32.

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9 This provision currently reads as follows:

> (8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of section 5a of this Act; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission.

In contrast to the limited scope of the 196 amendments, the 1974 amendments, 88 Stat. 138 (1974), constituted a complete overhaul of the Act They broadened its coverage from the agricultura commodities with which it had historically bee concerned to include "all other goods and articles . . and all services, rights, and interests in which contract for future delivery are presently or in the future deal in", subject to certain exceptions designed primarily t exclude securities. Consistently with this expansion i coverage, enforcement was transferred from th Department of Agriculture to a newly constitute Commodity Futures Trading Commission (CFTC). How ever, the amendments did not substantially alter any o the provisions which assertedly form the bases of a implied right of action. The antifraud and tradin limits sections were basically unchanged. Maximun fines were increased from $10,000 to $100,000 in th penalty section.[10] Section 5(d), requiring a contrac

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10 This provision currently reads as follows:

It shall be a felony punishable by a fine of not more tha $500,000 or imprisonment for not more than five years, or both together, with the costs of prosecution, for any person t manipulate or attempt to manipulate the price of any commodit in interstate commerce, or for future delivery on or subject to th rules of any contract market, or to corner or to attempt to corne any such commodity, or knowingly to deliver or cause to b delivered for tranamission through the mails or in interstat commerce by telegraph, telephone, wireless, or other means o communication false or misleading or knowingly inaccurat reports concerning crop or market information or conditions tha affect or tend to affect the price of any commodity in interstat commerce or knowingly to violate the provisions of section 4 section 4b, section 4c(b) through section 4c(e), section 4h, sectio 4o(1), or section 19 of this Act, or knowingly to make any false o misleading statement of a material fact in any registratio application or report filed with the Commission, or knowingly t omit in any application or report any material fact that i

market as a condition of designation, to p
manipulation and cornering, remained unchang
§ 5a(8) was altered so that exchanges were requ
enforce their rules *approved* by the CFTC rath
those rules not *disapproved* by the Secretary.

The 1974 amendments required contract mar
provide arbitration procedures for settlement
tomer grievances and claims not exceeding $
§ 5a(11). The CFTC was vested with power to
exchanges to adopt additional rules, § 8a(7),
bring actions to enjoin violations of the Act and
compliance through writs of mandamus, § 6c.
the reparations procedure in § 14 was establis
which more hereafter.

The history of congressional concern with com
futures trading has thus been one of steady ex
in coverage and strengthening of regulation. I
1968, and 1974 new commodities came under th
In each of these years the power of the reg
authority were augmented, and penalties were
extended, increased, or both. The question of C
sional intent with respect to private sanctions
the Act must be considered against this backgr
increasingly strong regulation designed to ins
existence of fair and orderly markets.

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required to be stated therein. Notwithstanding the for
the case of any violation described in the foregoing sent
person who is an individual, the fine shall not be n
$100,000, together with the costs of prosecution.

IV. PRIVATE CAUSES OF ACTION UNDI COMMODITY EXCHANGE ACT PRIOR THE 1974 AMENDMENT

During the late 1940's, the 1950's, the 1960'; early 1970's there was widespread, indeed general, recognition of implied causes of a damages under many provisions of the S Exchange Act, including not only the provisions, §§ 10 and 15(c)(1), see *Kardon* v. *Gypsum Co.*, 69 F.Supp. 512, 513-14 (E.D. P *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 78 Cir. 1951) (Frank, J.); *Fratt* v. *Robinson*, 203 631-33 (9 Cir. 1953), but many others. These the provision, § 6(a)(1), requiring securities e to enforce compliance with the Act and any regulation made thereunder, see *Baird* v. *Fran* F.2d 238, 239, 240, 244-45 (2 Cir.), *cert. de* U.S. 737 (1944),[11] and provisions goverr

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11 While the point is of no great importance as regards t take issue with the statements in the dissent, page 38, t *Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2 Cir.), *cert.* U.S. 81 (1966), held that violation of a rule of the New Exchange could not give rise to an implied cause of conclusion was that violation of certain types of rules wo to an implied cause of action, especially "when the rule explicit duty unknown to the common law", but that viol rule there at issue, requiring brokers to observe "just a principles of trade", did not. *Id.* at 182-83. We likewise d the statement in footnote 8 that "it is now well recogr private right of action may not be implied for a violation the New York Stock Exchange," citing *Jablon* v. *Dean W* 614 F.2d 677 (9 Cir. 1980). Although the particular rul *Jablon*, the "know your customer" rule, Rule 405 of th Stock Exchange, seems analogous to the rule at issue *Realty* and we thus have no quarrel with the result, necessarily accept the broad language of the *Jablon* opin of our conclusion that plaintiffs have alleged violatio sections of the Act which give rise to private cl

solicitation of proxies, see *J. I. Case Co.*
U.S. 426, 431-35 (1964). The *Baird* cas
importance since the claim was of failu
York Stock Exchange to perform its d
paralleling that asserted here against N
in 1961, Professor Loss remarked wi
violations of the antifraud provisions
exception "not a single judge has expres
the contrary." 3 Securities Regulation 17
Bromberg & Lowenfels, *supra*, § 2.2 (4
1946-1974 as the "expansion era" in im
action under the securities laws). When
for violation of § 10(b) and Rule 10b-
Supreme Court, the existence of an im
action was not deemed worthy of exten
Superintendent of Insurance v. *Ba*
Casualty Co., 404 U.S. 6 (1971); *Affiliat*
v. *United States*, 406 U.S. 128 (1972).[12]

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unnecessary for us now to decide whether such
for violation of NYME Rule § 44.02.

So far as concerns the dissent's citation of *O*
F.2d 764 (2 Cir. 1964), as a case denying a priv
the securities area, that decision rested on the
and in no way challenged the proposition tha
action would lie if the facts came within the

12 Indeed, at the time Congress considered a
amendments to the CEA, the Supreme Court
request to imply a cause of action under the fe
Pitt, *Standing to Sue Under the Williams Act*
Bus. Law. 117, 121 (1978).

The suggestion in the dissent that the *Superin*
case was a grudging acquiescence in 25 y
decisions, although finding some support in a
404 U.S. at 13 n.9, ignores the language
Superintendent of Insurance and the climat
Supreme Court there reversed a decision of t
apply § 10(b) under circumstances which press
absolute limit. The Court quoted not simply in a

causes of action under other statutes
the SEC were also widely recogn
Goldstein v. *Groesbeck*, 142 F.2d 422,
cert. denied, 323 U.S. 737 (1944)
Holding Company Act); *Cogan* v.
F.Supp. 907 (S.D.N.Y. 1958); *Schwartz*
F.Supp. 361 (S.D.N.Y. 1957), appea
holding on this point approved, *Schwa*
F.2d 195, 197-98 & n.5 (2 Cir. 1959); *B*
194 F.Supp. 207, 220-21 (S.D.N.
appellant conceding this point, 294 F
Cir. 1961)(Investment Company Act);[13]
v. *Marine Midland Grace Trust Co.*, 4
n.5 (2 Cir. 1971)(dictum), aff'd 406 U.
(1972)(Trust Indenture Act). These stat

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strong approval the statement in *Shell* v. *He*
827 (5 Cir. 1970):

> When a person who is dealing with a cor
> transaction denies the corporation's direct
> information known to him, the corporat
> availing itself of an informed judgment on
> regarding the merits of the transaction.
> private right of action recognized under Ru
> a remedy for the corporate disability.

And all this under a statute which *expressly*
actions, §§ 9(e), 16(b) and 18, with respect
securities transactions that were far more
reparations procedure of the 1974 amendmen
Loss, Securities Regulation at 3689-73 (196
this and other reasons the *Borak* decision
preclude a different ruling with respect to the
cause of action under § 10(b)—a ruling whic

13 Indeed, in several important cases under the
Act, defendants represented by able counsel
worthwhile to question the existence of an in
action. See, e.g., *Rosenfeld* v. *Black*, 445 F.
cert. dismissed 409 U.S. 802 (1972); *Moses* v.
(1 Cir.), *cert. denied* 404 U.S. 994 (1971); *F*
F.2d 731 (2 Cir. 1975), *cert. denied*, 429 U.

panoply of other remedies—enf
suspension, civil fines, crimina
express private actions—which,
the administrative reparations re
of violator, were every bit as o
those in the CEA, but argument
negated an implied private c
regularly and firmly rejected, s
much cited opinion in *Baird* v.
F.2d at 244-45; *Goldstein* v. *Groe*
at 426-27; *Fratt* v. *Robinson, su*
Dann v. *Studebaker-Packard Cor*
09 (6 Cir. 1961). The question h
these decisions were wrong in
Court opinions of the past four
necessarily implies, but whether
not justified in assuming they w
respect to the CEA.

Neither the generality and ne
interpretations of statutes regul
practices, for which the CEA v
respect to futures trading,[14] no

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14 While there are differences bet
securities fields, what is relevant to
common legislative objective of insurin
what are important public markets,
approach to attaining this objective.
fields has been repeatedly recognized
No. 93-1131, *supra*, at 19; H. R. Rep.
1936 amendments arose from an expli
in the commodities field as strong as
lest the unscrupulous would simply t
one market to another. H. R. Rep. No
(1934); 78 Cong. Rec. 10446 (June 4,
Jones of the House Committee on Ag
(June 3, 1935) (same). The analogy ha
the courts, see, e.g., *Silverman* v. *CF*

other fields, e.g., *Reitmeister* 691 (2 Cir. 1947)(action for statute making interception crime)(L. Hand, J.); *Fitzgerald Airways*, 229 F.2d 499 (2 damages implied from anti-dis Civil Aeronautics Act althoug complaint to CAB and crimin novel. They rested on principl Supreme Court decisions going *R. Co. v. Rigsby*, 241 U.S. 33 the right of a switchman t violation of the Federal Safety the only express sanctions wer stated:

> A disregard of the comm wrongful act, and where it of the class for whose esp was enacted, the right to r party in default is implied of the common law expre Action upon Statute (F), every case, where a statu thing for the benefit of a

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1977) (quoting Moore, J., in *Savag* Cir. 197); *P. J. Taggares Co.* v. (S.D.N.Y. 1979) (Weinfeld, J.); by *curiae* at 12; and by the comme Meltzer, *Secondary Liability Unde* 27 Emory L. J. 1115 (1978); No *Commodity Futures Investors*, 55 Congress was not only aware of the CEA in 1974, as shown below, b private right of action recognized i regulation.

remedy upon the
enacted for his adva
a wrong done to hin
Holt, C.J., *Anon.*, 6

Following *Rigsby* the S
plied causes of action o
Wyandotte Transportat
U.S. 191 (1967) (sustain
United States for dama
Act for removing ne
express remedies of
penalties); *United State*
U.S. 482 (1960) (sustain
United States for an in
Harbors Act); *Tunstal*
Enginemen, 323 U.S.
cause of action by uni
discrimination among
Board of Mediation); *S*
Inc., 396 U.S. 229 (19
cause of action under 4
Board of Elections, 39
implied private cause of
Rights Act despite
regulatory scheme and
Attorney General); and,
decisions under the se
Court itself has recogniz
early 1970's was on
consistently found im
University of Chicago,
718 (Rehnquist, J., co

Case Co. v. Borak . . .
federal courts, gave Co
the federal judiciary w
generally Note, *Implyi*
Regulatory Statutes, 7

Given so many cases
under a broad range of
instance of the securi
supported by a good
decisions and the rea
scarcely surprising tha
question prior to the
upheld the implicatio
under the CEA. Indeed
would have been alm
courts to have held

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15 Although it is true, as
v. *University of Chicago*
period, the Court frequen
imply causes of action fr
the same cases mentione
no doubt that particularl
statutes administered by
much taken for granted
See note 13 *supra*. There
itself, both before and af
v. *Peavey Company Com*
1970); *Ames* v. *Merrill*
F.2d 1174, 1176 (2 Cir.
cause of action under th
Dean Witter & Co., Inc.,
addition, several courts
precise contours of the p
of course by the securitie
implicitly that such an a
Produce Exchange, 434 U
Texas Cattle Managemen
v. *Bache & Co., Inc.*, 570
v. *NYME*, *supra*, 476 F.

remedies were a
claims for econ
important effort
ity futures ma
reported case, f
Goodman v. H.
1967).[16] The un
private right of
cases frm all of
commodity futur
& *Co.*, 291 F.Su
Harris, Upham &
1968), modified,
Egg Producers v.
1375, 1384 (S.D.
Commodity Serv
McCurnin v. Koh
(E.D. La. 1972),
v. Barnes Broke
(N.D. Tex. 1972)
Hamill & Co., 3

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16 The dissent's
trading had neve
which was "the
empirical basis.
Seligson v. *Neu*
1080, rendered i
"led to a string
past ten years."
confronted with
by the SEC, did
a private cause
in well-known c
to do so, see no

While we thin
are exaggerated,
extended it with
regarded these d
the law.

Arnold v. Bache
1973); *Deaktor*
534 (7 Cir.), *re*
Mercantile Exch
(per curiam); *Se*
378 F.Supp. 107
Miller v. New Y
Cir.), *cert. deni*

It is true that
a broker again
customer's acco
the Act, but nor
as either the ba
did *not* involve
customers. The
D. Schreiber &
grounds sub n
Deaktor, 414 U.
court. Plaintiffs
various member
lated the futur
violation of CE
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the *Deaktor* pla
to liquidate th
converse of the
The Exchange
§ 5a(8), 7 U.S.
exchange to "en
resolutions". Pl
Exchange with
futures market,
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§§ 52(8)
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existed

broker on his customer but for manipulation as well. The notion, strongly emphasized by the dissent, that such a decision escaped the knowledge of those framing the amendments, seriously underrates the expertise of our lawmakers and their staffs in subjects of particular concern to them.

Far from undermining the Seventh Circuit's recognition of an implied cause of action, the Supreme Court's reversal, 414 U.S. 113 (1973) (per curiam), on the ground that the court should have deferred to the primary jurisdiction of the Commission implicitly affirmed this recognition. Noting that " 'Congress has established a specialized agency that would determine either that a . . . rule of the Exchange has been violated or that it has been followed . . . ' ", the Court emphasized that " 'Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules . . . ' " and that " 'either determination will be of great help to the . . . court . . . . ' " *Id.* at 115, quoting *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 307 (1973). Thus the Court's reason for insisting on a determination by the Commission "in the first instance", 414 U.S. at 116, was that it would assist a court in hearing plaintiff's claims "in the second instance". The Court did not "decline to reach the issue" whether plaintiffs' claims were cognizable in federal court, as the dissent asserts (p. 40); it simply assumed that they were, as the Seventh Circuit had held.[16a]

Other cases upholding an implied cause of action outside the broker-customer relationship were *United*

16a Mr. Justice Stewart would have affirmed and allowed the action to proceed directly in the district court. 414 U.S. at 416.

Egg Producers v. Bauer International Corp., supra, 311 F.Supp. 1375, which recognized an implied cause of action under § 9(b) on behalf of various egg producers against an import-export firm, and *Seligson v. New York Produce Exchange, supra*, 378 F.Supp. 1076. *Seligson* arose out of the much-publicized "Salad Oil Swindle", and recognized an implied cause of action on behalf of the trustee in bankruptcy of a brokerage firm against the exchange, exchange officials, and the clearinghouse.[17]

While case based on pre-1974 facts decided after the 1974 amendment, apparently under pre-1974 law, are of less pertinence since the 1974 Congress could not have known of the decisions,[18] they deserve mention as

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17 We fail to appreciate the dissent's attempt to distinguish these two cases. With respect to *Egg Producers*, if implied private causes of action did not exist under the Act, there would be no cause of action for an injunction any more than there would be for damages. The *Seligson* decision was rendered before Senate consideration of the 1974 amendments and House repassage in the amended form. Moreover, what the dissent fails adequately to recognize is that the cases under the CEA, numerous and consistent as they are, cannot be taken in isolation but must be considered along with the vast body of law under the securities statutes which set the tone during the late '40's, the '50's, the '60's, and the early '70's, and on which the CEA decisions relied. The efforts to whittle all this away, pages 41-43, are unimpressive. We have already dealt, note 14 *supra*, with the argument as to the cases under Rule 10b-5. The contention that the securities legislation offered less in the way of remedies than the CEA would surprise most students of securities law; with the single exception of the 1974 reparations procedure for certain types of CEA violations, whose inadequacies are described below, they offered more. The argument that the sections of the CEA most heavily relied upon by plaintiffs were enacted before the explosion of the private right of action under the securities laws ignores the fact that the 1974 amendments to the CEA were intended to be a complete overhaul and were effected with vivid Congressional awareness of the decisions implying private causes of action under the CEA as well as the related subject of the laws administered by the SEC.

18 Congress was, however, apparently aware of the pendency of at least one of these cases. See note 30 *infra*.

indicative of the uncontradicted view of the la prevailing when Congress acted. In *Case & Co., Inc.* *Board of Trade*, 523 F.2d 355 (7 Cir. 1975)(Cumming Stevens, and Tone, JJ.), plaintiff sued the Board and it governors for violating §§ 5a(1) and 5a(8) of the CEA i suspending trading limits on soybean futures. The cou began its discussion of liability by stating that "[i]t i undisputed that a private cause of action may b maintained under the Commodity Exchange Act. Se *Deaktor* . . . ." *Id.* at 360. In *Hirk v. Agri-Researc Council, Inc.*, 561 F.2d 96, 103 n.8 (7 Cir. 1977), th same court flatly stated that "[p]rivate damage action are allowable under the CEA. See, e.g., *Deaktor* . . . . See also *Bartley v. P.G. Commodities Associates, Inc* CCH Com. Fut. L. Rep. ¶ 20,123 [1975-77 Transfe Binder] (S.D.N.Y. 1975) (churning complaint unde § 4b).

We see no need to burden this opinion with detaile examination of district court decisions concernin whether the 1974 amendments eliminated the privat cause of action theretofore unanimously recognized The courts have divided although the weight o authority is in favor of continued implication.[19] A noted, the only court of appeals to have considered th issue has held that a private cause of action should b implied. *Curran v. Merrill Lynch*, note 1 *supra*.

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19 Cases finding an implied cause of action: *Milani* v. *ContiCommo ity Serv., Inc.*, 462 F.Supp. 405 (N.D. Cal. 1976); *Shearson Hayde Stone* v. *Lumber Merchants, Inc.*, 423 F.Supp. 559 (S.D. Fla. 1976 *Bache Halsey Stuart, Inc.* v. *French*, 425 F.Supp. 1231 (D.D. 1977); *Kelley* v. *Carr*, 442 F.Supp. 346 (W.D. Mich. 1977), rev'd o other grounds, Nos. 78-1091, 1092, 5542, 5460 (6 Cir., May 1 1980); *Hofmayer* v. *Dean Witter & Co.*, 459 F.Supp. 733 (N.D. Ca 1978); *Berenson* v. *Madda Trading Co.*, CCH Comm. Fut. L. Re ¶ 20,689 (D.D.C. 1978); *Gravois* v. *Fairchild, Arabatzis & Smit Inc.*, CCH Comm. Fut. L. Rep. ¶ 20,706 (E.D. La. 1978); *Rivers*

V. THE CONTINUED EXISTENCE OF TH PRIVATE CAUSE OF ACTION

In deciding the issue here before us, we follo analysis set forth in *Cort* v. *Ash*, 422 U.S. 6 (1975).[20]

Rosenthal & Co., Civ. Action File No. CV 178-186 (S.D. Ga appeal pending, 79-1313 (5 Cir.); *Poplar Grove Planti Refining Co., Inc.* v. *Bache Halsey Stuart Inc.*, 465 F.Su (N.D. La. 1979); *Jones* v. *B. C. Christopher & Co.*, 466 F.Su (D. Kansas 1979); *R. J. Hereley & Son* v. *Stotler & Co.*, 466 345 (N.D. Ill. 1979); *Aiken* v. *Lerner*, Civ. Action No. (D.N.J. 1980); *Navigator Group Funds* v. *Shearson Hayde Inc.*, 77 Civ. 5350 (S.D.N.Y. 1980) (Broderick, J.); *Gra Conticommodity Services, Inc.*, 48 L.W. 2807 (D.D.C., M 1980); *Witzel* v. *Chartered Systems Corporation of New Yo* 48 L.W. 2823 (D. Minn., May 27, 1980).

To the contrary, in addition to Judge MacMahon's opinion case, 470 F.Supp. 1256, see *Arkoosh* v. *Dean Witter &* F.Supp. 535 (D. Neb. 1976), aff'd on other grounds, 571 F.2 Cir. 1978); *Consolo* v. *Hornblower & Weeks-Hemphill, Noy* 436 F.Supp. 447 (N.D. Ohio 1976); *Bartels* v. *Inter Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977); *Be Bache Halsey Stuart, Shields, Inc.*, 467 F.Supp. 311 (S. 1979); *Alkan* v. *Rosenthal & Co.*, CCH Comm. Fut. L. Rep. (S.D. Ohio 1979); *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Il *Fischer* v. *Rosenthal & Co.*, 481 F.Supp. 53 (N.D. Tex. 197 v. *Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. ¶ 31,100 (N.D. Ill. 1980). The three decisions from district Ohio which declined to find an implied cause of action, *Berman*, and *Alkan*, are no longer good law in that circuit in the Sixth Circuit's contrary decision in *Curran* v. *Merril* cited in note 1 *supra*.

20 This is:

> In determining whether a private remedy is implicit in not expressly providing one, several factors are relevant. the plaintiff "one of the class for whose *especial* ben statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby*, 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916) (emphasis su that is, does the statute create a federal right in favo plaintiff? Second, is there any indication of legislativ explicit or implicit, either to create such a remedy or to d See, e.g., *National Railroad Passenger Corp.* v. *National*

There is, however, one differentiating factor
transcendent importance as to demand mentio
outset. As shown in Part IV of this opi
decisions prior to the 1974 amendments had u
upheld the existence of a private cause of acti
the provisions of the Commodity Exchange Ac
will be shown in this part, the 1974 Congress
aware of the existing state of the law. Even
more, the question thus would not be whether
intended to create a new private right of a
1974, but rather whether it intended *sub si*
alter the significance that had long been giv
provisions by making other changes in the Act
this, however, we do not need to *assume*, as t
stated would be "appropriate" in upholding a
cause of action in *Cannon* v. *University of Chic*
U.S. 677, 696-97 (1979), "that our elected re
tives, like other citizens, know the law" or to "
that they "were aware of the prior interpretat

Railroad Passengers, 414 U.S. 453, 458, 460, 38 L.
94 S. Ct. 690 (1974) (*Amtrak*), *supra*; *Securiti*
Protection Corp. v. *Barbour*, 421 U.S. 412, 423, 44 L.
95 S. Ct. 1733 (1975); *Calhoon* v. *Harvey*, 379 U.S.
Ed. 2d 190, 85 S. Ct. 292 (1964). And finally, is t
action one traditionally relegated to state law, in an a
the concern of the States, so that it would be inap
infer a cause of action based solely on federal law? Se
v. *Wheeler*, 373 U.S. 647, 652, 10 L. Ed. 2d 605, 83
(1963); cf. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 43
2d 423, 84 S. Ct. 1555 (1964); *Bivens* v. *Six Unkno*
Narcotics Agents, 403 U.S. 388, 394-395, 29 L. Ed. 2
Ct. 1999 (1971); *id.* at 400, 29 L. Ed. 2d 619, 91
(Harlan, J., concurring in judgment).

We read this in light of the later *caveat* in *Touche Ro*
Redington, 442 U.S. 560, 575 (1979) that the basic inqui
to plumb the intent of Congress, that the *Cort* factors
inquiries helpful in that endeavor, and that satisfactio
more of the *Cort* factors will not alone carry the day.

related statute. See *Lorillard* v. *Pons*, 580 (1978) ("Congress is presumed to b administrative or judicial interpretation Here the existence of an implied right o the Commodity Exchange Act as it stoo repeatedly called to the attention of approved by Congress. This alone suffic appellees' claim that if the 1974 Congr create a private cause of action, it wou have said so and that it is implausible t "Congress absentmindedly forgot to m tended private action." *Cannon, supra*, 4 (Powell, J., dissenting). Whether rightly light of recent Supreme Court jurisprude had read a private cause of action into t as they had done with statutes of sim related fields, and Congress knew that so. The burden thus lies on those who 1974 amendments demonstrate an inten prior law, or, paraphrasing the langu Justice Powell's *Cannon* dissent, *supra*, t the changes that it did, Congress "a forgot" to repeal the private cause of acti of the 1974 Congress with respect to pr action for violations of the CEA, on wh leans so heavily, is no more significant t silence of the 1975 Congress whic amended the Securities Exchange Act, When a principle has become settled decisions, there is no occasion for Con unless it wishes a change.[21]

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21 We find little force in the dissent's reliance, p 11, on the failure of the 1968 Congress to enac introduced by Representative Fino providing a

1. Taking the first of the *Cort* facto
difficulty in concluding, despite appellee
contrary, that the plaintiffs were amon
whose especial benefit the statute w
phrase going back to *Texas & Pacific R*
supra, 241 U.S. at 39. Although Congre
tees and sponsors of the ill-fated 1
devoted most of their eloquence to inju
producers at the hands of wicked s
Senate Report on the 1922 Act recogn

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action against exchanges. Quite apart from th
relying on actions of an earlier Congress, an
failure to act, see p. 59 *infra*, the question of a p
was simply not considered by Congress in th
process. The bill that became the 1968 amend
never contained a private remedy provision,
never mentioned in either congressional rep
discussed in congressional debate. The dissent's
carefully comparing the bills and deliberatel
rejecting the provision in Rep. Fino's bill
gossamer. Since the failure to act on the provisi
the slightest significance with respect to congre
time, its bearing on the effort to discern con
years later, in 1974, is infinitesimally small.

Beyond all this, when Rep Fino introduced his
right of action provision, he included with h
newspaper articles about the commodities inc
discussed the Great Salad Oil Swindle, and not
for the receiver of Ira Haupt & Co., a broker
under in that affair, "are trying to determine
justifiably file suit against the exchange for fai
Haupt eventually did, and the court recognized
action against the exchange, see *Seligson* v.
Exchange, *supra*, 378 F.Supp. 1076. If Con
consideration to Rep. Fino's bill, it could well ha
explicit remedy provision because it considered
light of the then judicial climate, as had turned
Ira Haupt & Co. before the 1974 amendments
17 *supra*. This further illustrates that attempti
to the failure of Congress, and even more so of
to enact legislation is a speculative enterprise

> Transactions in grain futur
> public for speculation and
> the purpose of eliminating
> practicable, the hazards in
> grain and its products and b
> fluctuations. Public speculat
> risk for the producers, dea
> wish to hedge their cash gra
> No. 871, 67th Cong., 2d Se

It is true that much of the deb
House consisted of vituperati
"gambling" in the grain trade t
producers and the consumer. H
were generally directed at *big* sp
a position to manipulate the n
always the recognition that "
acceptable and indeed beneficia
producers in § 3, the statement
Act, was due to a desire to stat
then existing notions of the c
than to risk invalidation by incl
Supreme Court might not thi
Wickard v. *Filburn*, 317 U.S.
twenty years in the future.[23] A

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22 See, e.g., 62 Cong. Rec. 9404 (
Chairman Tincher of the House Com
never said that the sale of wheat for f
out . . . but have always said, and
gamblers manipulate the grain mark
consumer but unfair to the legitimate
of Rep. Voight, a member of the Co
reported out the bill) ("The bill will r
stop it altogether without hurting b

23 The Court in *Hill* v. *Wallace*, su
imposed by the 1921 Act applied to

the importance of the specula
functioning of the futures marke
fully recognized by Congress as

It is plain in any event that by
amendments, as was later to be
Report on the 1978 amendme
protected under federal commodi
to include speculators." H. R. R
Cong., 2d Sess. 84 (1978). As
House Report, "The fundame
measure is to insure fair practice
the commodity exchanges and to
control over those forms of spec
too often demoralize the mark
producers and consumers and
selves." H. R. Rep. No. 421, 74
(1935). "Fair practice and hon
course, beneficial not only to
legitimate speculators using the
expressed in the last clause of t
injury to "the exchanges themsel
passed protection for those usin
was made clear in a later passage

Board of Trade in Chicago. "Looked
any limitation of the application of th
or to that which Congress may deem,
an obstruction to interstate commerce
the Act. 259 U.S. at 68. Congress
focusing on the interstate aspects of
Rec. 9404 (June 26, 1922) (Remarks
House Committee on Agriculture)
commerce, using the language of the
grains and this law will not apply
interstate transactions as defined by t
15, 1922) (The Court "called attention
interstate commerce we could reach
this bill is strictly following the d
Court . . .").

"[The bill] simply provides
what are important publi
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whether they belong to th
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While the debates in Con
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there was a recognitio
speculators, and the focus
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detrimental not only to
also to those referred to
dealers.[24] The clearest in

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24 Representative Jones, Ch
Agriculture, stated that the
on the Chicago Board of Tr
for the constant fluctuation
10446 (June 4, 1934). He l
was "to check manipulation
rig the market to the detrim
all others engaged in leg
commodities." 79 Cong.
Representative considered
speculators who deal in large
4, 1935) (Remarks of Rep. G
activities of "15 or 20 big gr
injure but will beneficially
(Remarks of Rep. Sabath).
effect. The bill was designed
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some detail. See 80 Cong.
Sen. Pope). Senator Pope
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> it is the small traders—th
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> but who furnish the real

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Rep. No. 743, 90th Con
No. 947, 90th Cong., 2
U.S. Code Cong. & Ad
House Report noted t
carried with it "the dan
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743, *supra*, at 2, but als
of the legitimate specul
provides a means of re
handling the actual com
higher prices to proc
consumers." *Id.*

Finally, and most imp
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Report noted the large
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supra, at 39. The benef
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House Report, in the la
opinion, *id.* at 138, but a

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236, 247-48 (19(
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compel arbitration, the parties having agreed that an implied cause of action existed under the Act, Judge Gurfein wrote that "[w]e have no doubt that the Act itself, *enacted as it was for the protection of investors*, prohibited a surrender of private remedies through an agreement to arbitrate which was not voluntary in the sense that the penalty for refusal was exclusion from the market." *Id.* at 1179 (emphasis supplied).[26] See also *Silverman* v. *CFTC*, 562 F.2d 432, 438 (7 Cir. 1977) ("We must be mindful of a Congressional purpose, clearly evidenced at least since 1933, to protect the American investing and speculating public not only from fraud and fraudulent practices, but from those whose past actions indicate that they might be tempted to engage in such practices") (quoting Moore, J., in *Savage* v. *CFTC*, 548 F.2d 192, 197 (7 Cir. 1977)).[27]

2. We turn now to the second and evidently the most important, see *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575, of the *Cort* factors, "is there any indication of legislative intent, explicit or implicit, either to create such a [private] remedy or to deny one?" 422 U.S. at 78. This inquiry requires an intensive examination of the legislative history of the 1974

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26 While the dissent chooses to characterize this as a "passing reference", it shows the clear understanding of the writer that the Act was enacted to protect speculators and not merely hedgers.

27 The only discordant note on the point that the CEA was intended to protect "speculators" appears to be *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979), a distinct minority view from which the dissent liberally quotes. The commentators have joined the courts' nearly unanimous chorus on this point. See Bromberg & Lowenfels, *supra*, § 462(1) (concluding that "the commodity laws' lack of emphasis on investors is only apparent, not real"); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. Rev. 804, 826 (1975) ("the statute's clear purpose—to increase existing protection of commodity futures investors").

amendments. We conduct this, of course, with full awareness of the cautions in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976) and *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31-32 (1977), against the dangers of undue reliance on "passing references" by others than the Congressional committees or sponsors or on general statements not directly relevant to the issue at hand.

In our view the legislative history amply demonstrates the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and a desire to preserve them. We are not, as the dissent suggests, "presuming" that Congress was aware of these decisions; the evidence of its awareness is overwhelming.

We begin with the House Report. This noted that when exchange self-regulation first developed, "[V]ery little thought was probably given to whether the failure to meet [stated] ideals would expose the exchanges to legal liability . . . ." H. R. Rep. No. 93-975, *supra*, at 45. The report stated that this view began to change early in the 1920's. "Perhaps the adoption of federal regulatory legislation spurred this total reorientation of the relationship between exchanges and the public. Slowly, the courts began to look upon exchange regulation as a guarantee to the public that its members would not violate its code of conduct." *Id*. In 1968, the report continued, amendments to the CEA required exchanges to enforce their rules, § 5a(8). The existence of private rights of action was thought to have had a perverse effect on the effectiveness of this legislation which the report explicitly noted:

> In the few years this provision has been in the present Commodity Exchange Act, there is grow-

> ing evidence to indicate that, as opposed to strengthening the self-regulatory concept in present law, such a provision, coupled with only limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act—may have actually have worked to weaken it. With inadequate enforcement personnel the Committee was informed that attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants. (emphasis in original).

Later in the Report the Committee noted that one of the specific problems "brought to [its] attention" was the:

> Growing difficulties facing exchanges in self-regulatory actions as a result of *private plaintiffs seeking damages* against the markets. As examples, *exchanges are sued* for actions taken in emergency situations even when the action has been taken at the request (or order) of the CEA. *Id.* at 48 (emphasis supplied).

Nothing in the report, however, indicated dissatisfaction with the private right of action; the objective was to deal with the attendant reduction in exchange rulemaking. This was to be accomplished by empowering the CFTC to require exchanges to adopt rules, § 8a(7).[28]

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28 The House Report also contained a letter from the Department of Justice to Chairman Poage of the House Committee on Agriculture

The existence of an implied private right of a was also clearly revealed to Congress in the deba what became the 1974 amendments. Introducin bill, Chairman Poage used the language quoted a which eventually appeared in the House Report, the change in the legal posture of exchange regulation. He then remarked that "when the Com ity Exchange Act was enacted, courts implied a pr remedy for individual litigants in the Comm Exchange Act." 119 Cong. Rec. 41333 (Dec. 1973).[28a] He went on to note, as would the H report, that as "the judgment of the board of dire of many of the exchanges in implementing deci under self-regulatory functions is becoming increas a justiciable issue," attorneys were advising excha to prune out rules they might not be able to enfor order to avoid the threat of liability in private act This threat was described as providing the excha with a "solid reason" for retrenching on self-regul efforts. *Id.* At the outset of consideration by the

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wherein the Department representative twice cited to the Supreme Court decision in *Deaktor*, *supra*, 414 U.S. 113. The concerned the interrelation between exchange rules and an law, and the author, discussing the doctrine of primary jurisd referred to "situations where the challenged activity is *alle violate the Commodity Exchange Act* as well as antitrust law R. Rep. No. 93-975, *supra*, at 26 (emphasis supplied). *Deakt* cited as a case, obviously brought by a private plaintiff, alleged violations of the CEA. Any legislator who read this thus have been aware that private individuals could sue exc for violations of the CEA; they had done so in *Deaktor*, a Supreme Court had merely required an initial resort regulatory agency for its views where these would be useful

28a The dissent chooses to make a point, footnote 16, that Ch Poage was in error since the first decision implying a private r action under the CEA was made in 1967 rather than 1966. to see the significance of this.

House, then, the legislators were informed
Chairman of the Committee considering the bi
private rights of action were implied under the
This was not a mere passing reference, but a
statement of fact that was a necessary s
explaining why new legislation was needed. Th
amendments signaled a dramatic shift from the
of exchange self-regulation to authorization
CFTC to compel the exchanges to alter or adopt
§ 8a(7), and the proponents of the amendments
pains to explain the need for such a shift
explanation centered on the existence of an i
private right of action. Amendments were requi
force exchanges to adopt beneficial rules becau
threat of the judicially implied private right of
had led them to shirk this responsibility. Co
could not have understood why it was changi
underlying theory from exchange self-regulati
compulsory regulation without recognizing th
private rights of action that had been judicially i
under the Act demanded this change. It opted t
the problem that had developed not by abolishi
private right of action but by empowering the C
require the exchanges to adopt appropriate rul
amount of labored parsing can obscure the self-e
truth that Congress knew the courts were im
private rights of action and did nothing to alter

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29 The point was repeated later by Representative Thone, a
of the Committee on Agriculture. See 120 Cong. Rec. 1074
11, 1974) ("Some observers believe that the provision of t
amendments requiring exchanges to enforce their own rules,
implicitly giving private parties the right to sue for nonenfor
has had a perverse effect. To avoid risk of litigation, e
authorities have been encouraged to reduce rather than str
rules designed to insure fair trading").

matters little whether this be called r
approval.

The House hearings are replete with ref
maintenance of private causes of action u
A representative of various New Yor
exchanges informed the House Committe
ture that the Chicago Board of Trade wa
moment the target of a $200 million clas
urged Congress to "take steps to insure
regulated exchanges are not exposed to
astronomical civil liability suits . . .",
Review of Commodity Exchange Act and
Possible Changes Before the House C
Agriculture, 93d Cong., 1st Sess. 121 (197
which Congress did not do. Another ex
sentative and FCM, discussing the arbi
dures to be required of contract mark
House Committee that "In addition to the
procedures, complainants *of course* have
courts." *Hearings on H. R. 11955 Befo*
Committee on Agriculture, 93d Cong.,
(1974) (emphasis supplied). A letter sent
of the just-cited hearings from Continen
indicates that the cases cited in Part IV o
may well have been only the tip of the
cases where the private cause of action w
and was sustained in a published opinio
calls to the Committee's attention "one
action settlement proceeding in court" w
the mailing of 339,000 legal notices an
legal fee claims of over $2,250,000. *Id.*

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30 The reference was apparently to *Case & Co.,*
Trade, supra, 523 F.2d 355, see p. 31 *supra*.

letter advocated requiring complainai
between arbitration or settlement proced
to courts "which have already held they
tion over private complaints based on vi
present law." *Id.*

The existence of a private right of a
repeatedly indicated during the Senate h
four bills to amend the CEA. *Hearings*
2578, S. 2837, and H. R. 13113 Befo
Committee on Agriculture and Forestry,
Sess. (1974). Senator Clark and a coi
expert, Professor Schotland of Georgeto
expressed the view that private actions
under the Act, *id.* at 205, 737, 746. A re
the Minneapolis Grain Exchange obj
settlement procedure contemplated
markets because the claims which excha
required to adjudicate were not limited
amount and wished these to be confined
the smallness of the claim entailed
impediment to Court litigation." *Id.* at 41
appeared in the bill as enacted, § 5
President of the Kansas City Board of T
Senators to protect exchanges "from un
costly defenses of lawsuits" brought und
at 317. He had made the same requ
House, with similar lack of success. *Hea*
11955, supra, at 123.[31] We shall have mo

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31 The dissent relies heavily on a chart introduced
Hearings, reproduced at footnote 14, to support
Congress did not preserve the previously recogni
action in 1974. The chart was not prepared by Co
Senate Committee, or even a single legislator,
committee staff. There is no suggestion that in p
the staff went beyond the explicit provisions of t

Congress' awareness of the privat
its desire to preserve it when w
provision preserving the jurisdi
However, what we have develope
alone sufficient to invoke "the we
construction that the reenactmer
porates preceding judicial in
Vranken v. *Helvering*, 115 F.2d 7
(L. Hand, J.), *cert. denied*, 313
canon which, as shown by the *Va*
limited to interpretations by the
Electric Storage Battery Co. v. *S*
14 (1930); *Lorillard* v. *Pons*, 4
(1978); *Bennett* v. *Panama Canal*
1282 (D.C. Cir. 1973) (Wyzans
irrebuttable presumption which f
ment with knowledge [of the Fift
tion of "may" as permissive]"). Th
particular force to the instant c
amendments constituted "the first
the Commodity Exchange Act sinc
Rep. No. 93-975, *supra*, at 1, the
provisions were left unchanged, a
made acutely aware of the prior
that these provisions gave rise
action.[32]

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does not purport to deal with the b
"damages", but only with the subject
the chart had attempted to deal with th
it could have reached only one conclusi
implied private right of action, since th
the courts prior to the 1974 amendm

32 The dissent argues that none of t
exception of *Deaktor*, was expressly c

The Supreme Court has app
numerous occasions. In *Lorillard*
(1978), Justice Marshall, writ
Court, said that when Congre
statute incorporating sections of
statute, "Congress is presumec
administrative or judicial inter
and to adopt that interpretatio
statute without change"—even
above, the interpretations were
and not by the Supreme Cou
significant that the judicial const
statute had been unanimous, *id.*
judicial implication of private ri
1974 in our case. In *Georgia* v. *U*
526, 532-33 (1973), the Court v
question concerning interpretatio
Act, enacted in 1965 and exte
deliberations" in 1970, with cha
areas other than the section b
Court had reached a decision on
the 1969 case of *Allen* v. *State E*

Congress' failure to mention *Deaktor*
We fail to see why. As we have dev
evidence that Congress was well aw
consistently implied private rights of
fact was brought out in the House Rep
hearings before both houses, and was
specific aspects of the bill. In light of
specific case names or citations were n
this was simply because no one parti
pre-1974 case confronting the question
action without limitation in the opinio
at issue—a result foreordained by the
securities laws—and *Deaktor*, which i
owed by *Baird* v. *Franklin*, *supra*, 1
thirty years before, thus was not a n

U.S. 544 (1969). Justice
Congress disagreed with
Allen, it had ample oppor
After extensive deliberatic
the Voting Rights Act, du
repeatedly discussed, the
years, without any subst
411 U.S. at 533. A footno
that the "repeated discus
hearings. *Id.* n.5. While we
decision of the stature of
since the Court's opinion i
not an express holding o
cause of action under the
cases, including the Seve
review in *Deaktor*, reache
implication, and decisions
action were called to the a
in Congressional hearing
States but in the House

The presumption just
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changes made in the CEA
up in detail, we note cert
to those already discussed
strong showing of an int
cause of action for fraud,
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order to justify a conclu
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1974 amendments was d
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the regulation of futures
93d Cong., 2d Sess. 1 (1
original hearings in the H
the Committee on Agri
strengthening and revisin
No. 93-975, *supra*, at 53
of the House by the C
ranking minority membe
Cong. Rec. 10736 (April
Poage) ("to strengthen
trading); *id.* at 10739 (R
inform and strengthen
Senate was the same. S
supra at 18 (section en
Extended Regulation").
Lynch, supra, note 1 at
the CFTC Act . . . indic
extend further protectio
rather than to extinguish
Yet the appellees would
course of ascribing to C
to private sanctions com
legislative purpose. See
Association v. *Federal*
672, 690 (D.C. Cir. 197
(1974) (Wright, J.) ("w
susceptible of more tha
only consult its langua
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generally Cox, *Judge Lea*
tion of Statutes, 60 Har

In support of th
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33 These are FCM
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34 See *Hearings*
Discussion of Po
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House Committee
2485, S. 2578,
Committee on Ag

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Corp. v. *I*
(Amtrak), 41
v. *Redingto*
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> right of final determination by the courts are expressly preserved. 120 Cong. Rec. 30459 (Sept. 9, 1974).

The first sentence strongly suggests that Congress did not intend to repeal private rights of action by enacting the reparations procedure, and the second sentence is not to the contrary. If the reparations procedure was intended to be exclusive, then it *certainly* would lighten the burden on the courts, even with review of reparations orders by the courts of appeals. But the Senator spoke in terms of "hope" and lightening the burden "somewhat"—as if reparations were an alternative he hoped had been made attractive enough to sway some aggrieved traders away from the courts. The second clause relating to judicial review simply noted that even for those who elected reparations there could still be court involvement. Again the House Report describes the reparations procedures as "intended as a separate remedy designed to supplement the informal 'settlement' procedures contemplated of the contract markets and registered futures associations which are required under other sections of the legislation . . . ." H. R. Rep. No. 93-975, *supra*, at 22. These last two types of settlement procedures, however, are expressly made voluntary by the Act. See §§ 5a(11), 17(b)(10). It can therefore be inferred that the reparations remedy is of the same character, and that the aggrieved trader is in no sense compelled to resort to reparations to obtain relief. Commentators have relied on this reasoning, and the savings clause in § 2(a)(1), in concluding that "the victim of a CEA violation is free to ignore the reparations procedure and file a lawsuit." Bromberg & Lowenfels, *supra*, § 461 at 82.362 (1979). The CFTC is

of the same view. See 41 F.R. 3994 (Jan. 27, 1976); *id.* at 18472 n.5 (May 4, 1976).[35]

The argument that the reparations procedure was intended to be the exclusive private remedy is further

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35 The dissent argues, despite all these contrary indications, that the reparations procedure was designed to be the exclusive private remedy beyond informal settlement. In support of this it quotes a letter from Earl Butz, Secretary of Agriculture, published in the House Report, which states that the reparations procedure "should make possible full and equal justice for those who feel that they have been in some way damaged in the handling of their commodity accounts." The dissent underscores this language, although it is not at all clear what about it suggests that reparations were intended to preclude private actions rather than constitute an additional remedy for aggrieved persons to whom the burden of litigation might be prohibitive. In any event it is irrelevant to our case. The plaintiffs seeking relief before us are not complaining about the handling of their accounts but rather of broad market manipulation. The dissent further stresses a passage from the House Report where it is stated that the Commission "will have original jurisdiction to consider all such complaints" which have not been resolved informally. Again, nothing in this suggests that Commission jurisdiction of reparations proceedings was meant to preclude the jurisdiction of the courts which had been widely recognized. The dissent also relies on the ceiling for civil penalties against exchanges in § 6b of $100,000, arguing that allowing private recovery for "unlimited" damages would be inconsistent with this ceiling. Penalties and damages, however, are quite different in nature. The former are punitive and some limit on the regulator's discretion to impose them is necessary. The latter are remedial and naturally limited to the loss caused by the defendant. Further, the dissent's argument proves too much. There is a limit of $100,000 on the fines which can be imposed on a FCM under § 6(b), but the FCM's are subject to "unlimited" private recovery in reparations. Congress obviously saw no inconsistency between allowing recovery for actual damages and limiting fines. Finally the dissent states that under § 6b fines against exchanges are limited to "an amount which will not 'materially impair the contract markets' ability to carry on its operations and duties.'" P. 47. Rather the CFTC is required to *consider* whether a fine will have this effect; the only ceiling in § 6b is the $100,000 maximum, which, incidentally, is not an "overall" limitation as the dissent states but rather a limit per violation. (For example, each day of failure to comply with a cease and desist order is a separate violation, § 6b). Concern for an FCM's ability to carry on business is specifically required to be considered in § 6(d), yet FCM's are subject to full damages in reparations.

negated and the case for the continuance of the privat cause of action is enhanced by the jurisdictional saving clause, § 2(a)(1).[36]

As passed by the House, the exclusive jurisdictio provision read as follows:

> *Provided,* that the Commission shall have exclusiv jurisdiction of transactions dealing in, resulting ir or relating to future delivery . . . *And provide further,* that nothing herein contained shall su persede or limit the jurisdiction at any tim conferred on the Securities Exchange Commissio or other regulatory authorities under the laws o the United States . . . .

The purpose of this was to separate the functions of th new CFTC from those of the SEC and other regulators As explained in the House Report, "All commoditie trading in futures will be brought within federa regulation under the aegis of the new Commissior however, provision is made for preservation of Secur ties Exchange Commission jurisdiction in those area traditionally regulated by it." H. R. Rep. No. 93-97 *supra,* at 3. See generally Johnson, *The Commodit Futures Trading Commission Act: Preemption as Publi Policy,* 29 Vand. L. Rev. 1 (1976); Russo & Lyon, *Th Exclusive Jurisdiction of the Commodity Future Trading Commission,* 6 Hofstra L. Rev. 57 (1977). Th provision was not intended to limit the jurisdiction o

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36 Plaintiffs do not seek to base their right of action on th jurisdictional provision, but rather point to it as evidencing congressional concern to preserve existing rights of action. Appellee criticism, derived from *Touche Ross & Co.* v. *Redington, supra,* 44 U.S. at 577, that plaintiffs' rights must be found in substantive an not jurisdictional provisions, is therefore inapt.

the courts. See *Jones* v. *B. C. Christopher & Co.*
466 F.Supp. at 218-19.

However, there was fear that it would do
numerous objections were raised to the House p
in the Senate hearings. Admittedly some of the
not primarily concerned with the question o
jurisdiction to hear claims in private actions ur
CEA. Chairman Rodino of the House Committe
Judiciary was concerned that the House p
might be read as pre-empting state courts
jurisdiction to enforce futures contracts under
commercial law and "to oust even federal co
jurisdiction". Testifying before the Senate Con
he suggested an amendment "to define the juris
including antitrust jurisdiction, of federal cou
commodity transactions." *Hearings on S. 2485,*
S. 2837 and H. R. 13113 Before the Senate Co
on Agriculture and Forestry, supra, at 259-60
Chairman Rodino's remarks were focused on a
jurisdiction, they were not limited to that. He
generally that federal courts retained jurisdicti
cited antitrust jurisdiction as an example sup
this view. Other objections to the exclusive juri
provision of the House bill were explicitly addr
the preservation of private rights of action.[37]
Clark noted that treble damages actions, prov
bills which he and Senator McGovern had intr

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37 See also testimony of Deputy Assistant Attorney
Clearwater of the Antitrust Division, *id.* at 663, to which
Talmadge responded: "I have read your statement in its ent
I doubt that this committee, and I doubt the House hac
depriving either Federal courts or [sic] jurisdiction in
matters, *or any other matter,* and certainly not State cour
664 (emphasis supplied).

were often the most effective enforcemen
"Unfortunately, the House bill not only
authorize them but section 201 of that bill ma
all court actions. The staff of the House A
Committee has said that this was done inad
and they hope it can be corrected in the Sena
205. Professor Schotland did not refer direct
exclusive jurisdiction provision, but urged ra
the reparations provision, if retained at all,
accompanied by "explicit language in the sta
Federal and State courts are still open if a co
prefers to go to trial there." *Id.* at 737, 747

The upshot of these various objections
addition by the Senate of the "savings clause
§ 2(a)(1):

> nothing in this section shall supersede or
> jurisdiction conferred on courts of th
> States or of any State. S. Rep. No. 93-11
> at 54.

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38 Defendants and the dissent suggest that the failure to
bills is evidence of legislative intent to repeal the priv
action. This suggestion is unpersuasive. None of the bill
simple private right of action for actual damages. Rathe
proposals, H. R. 11195 and S. 2378, would have ex
previously judicially recognized right of action by p
treble damages for any violation; and one bill, S. 283
treble damages for a willful violation and actual d
nonwillful violations. The dissent's argument that it woul
simple to change the bills so as to eliminate the provisi
damages ignores that trebling was what the propos
Simple damages were recoverable under existing law. V
"ignored" the discussion in the *Amtrak* case, 414 U.S. at
dissent charges, p. 45, where Congress failed to adopt an
that would have altered the interpretation which the
Transportation had placed on the proposed act. It
inapposite.

The purpose of this change was stated
clear that . . . Federal and State cou
jurisdiction." *Id.* at 6. The Conferenc
Senate amendment, with the same sta
Rep. No. 93-1194, 93d Cong., 2d Sess.
Rep. No. 93-1383, 93d Cong., 2d Sess.
respective chairmen of the House and
tees reported that "the conferees wishe
that nothing in the act would supersed
jurisdiction presently conferred on court
States or any State. This act is reme
designed to correct certain abuses w
found to exist in areas that will now c
jurisdiction of the CFTC." 120 Cong. R
10, 1974) (Senator Talmadge); 120 Co
(Oct. 9, 1974) (Representative Poage). W
this with Congress' recognition that ju
private causes of action had been held
conferred, the conclusion that Congres
continued recognition is nigh irresistibl

Appellees' primary answer to the foreg
is that the pre-1974 cases upholding a p
action under the CEA were wrongly dec
new trend in Supreme Court jurispruden
to implication and that, in consequenc
desired to preserve such a cause of acti
clause was insufficient and nothing sh
statement would do. This argument migl
impressive if we were dealing with legisl
Congress today. But the law here before
on October 23, 1974 and "the relevant
whether Congress correctly perceived th
the law, but rather what its perception c
Brown v. *G.S.A.*, 425 U.S. 820, 828-29

with approval by the majority in *Cann*
of Chicago, supra, 441 U.S. at 710-1
did the 1974 Congress perceive the st
allowing implied causes of action under
perception was correct. As already
related area of securities regulation w
J. I. Case Co. v. *Borak, supra,* 377 U.S
cited with approval, subsequent to t
ments, in *Cort* v. *Ash, supra,* 422 U.S
distinguished but in no way disappr
Barbour, 421 U.S. 412, 423-24 (197
course follow the most recent pronou
Supreme Court, those pronouncem
attention on the question of legislative
evaluation of congressional action . .
account its contemporary legal context.
441 U.S. at 698-99.

The sole decision preceding enactm
amendments to which appellees point a
new trend is the *Amtrak* case, 414 U.S
January 9, 1974. Apart from the fact t
decided when the amendments were w
enactment and there is no evide
concerned with the amendments were
decision would not in any event have
flag to Congress to make its approval c
of action explicit. The clear language of
and its legislative history manifested a
suit only by the Attorney Genera
employees, and not by others such as
passenger association. The Secretary o
had voiced this interpretation during t
as Justice Stewart reasoned, "it is sure
that the members of the Committee w

mute if they had disagreed with
sponsor of the bill in the Hou
both when introducing the bill a
that private actions *were* availab
"most unlikely" that the legis
amendments "would have sto
disagreed with it."

Finally, Justice Stewart emp
private suits would be inconsist
purpose of the Amtrak Act, sinc
concerned with paring rail pass
and without time-consuming p
This would have been reason e
private cause of action even un
432. See also *SIPC* v. *Barbour*,
(1975) (*Amtrak* viewed as case v
action was inconsistent with leg
there is little dispute that the
would be effectuated by private

In light of this it is unnecessa
far the recent triad of *Ca*
Transamerica may have gone i
cause of action. We do think, ho
about the death of the implied
have been circulating in the wak
attitude strongly reflected in th
ated, at least as far as previous
concerned, and that the effect of
to emphasize that the ultimate
sional intent and not judicial
constitute wise policy. See *Zeffir*
Banking and Trust Company
(No. 79-2259) (injured debent
implied cause of action under

against indenture trustee wh
Two of the decisions themse
actions, *Cannon* under Title IX
§ 215 of the Investment Advise
support for the result we hav
since the majority opinion rec
on implying rights of action
courts to consider Congression
legal context. Both *Redington*,
right of action under § 17(a)
Exchange Act, and *Transam*
implied action for damages u
Investment Advisers Act, co
were enacted *prior* to the gre
recognition of implied rights.
action in 1974 involved in thi
involved in *Cannon*, the congr
and 1940 under review in *Redi*
were not taken against a bac
judicial recognition of implied
for damages either as a genera
to the specific subject matter o
the legislative history on priv
both *Redington* and *Transamer*
442 U.S. at 571-72; 62 L. Ed.
the instant case. *Redington* in
provision, as to which there
implication of private causes o
"flanked by provisions" expr
right, and *Transamerica* turne
declaration that certain acts
void, which was taken to grant
not of damages, and the corre
jurisdictional clause of the In

Far from foreclosing in
action, *Transamerica* exp
provide such actions "
language or structure
circumstances of its ena

Even if we were to acc
Redington-Transamerica
if they had been rendere
to the CEA were ena
demonstrates beyond fai
and approved the un
recognizing private caus
which in turn, were s
Court's decision in *Bora*
now to be regarded as an
441 U.S. at 735-36 (Pow
supra, 442 U.S. at 576
thinking that the 1974
would be such a drastic

Appellees also argue t
issue cannot support a p
they merely proscribe
duties, rather than expli
5(d), 5a(8)). It is true th
casts a statutory provisi
of the propriety of impli
U.S. at 690 n.13; *Transa*
154, but this is by no m
here, the legislative hist
[a statute's] enactment" e
a private cause of action
is expressed cannot be p
to its realization. The ca
a linguistic test for imp

securities cases are a
dichotomy. *Cannon*, s
Even if Congress w
significance of this di
not, there would have
that the CEA would no

The same considera
criminal provision su
private cause of acti
implied a cause of actio
Deaktor, supra, 479 U
Court had implied s
provisions, see, e.g., *Bo*
for Congress in 1974
continue. In *Cort* v. *A*
of the 1974 amendmen
imply a private cause o
suing derivatively fron
corporations from ma
contributions. He was
"provision of a crimin
preclude implication o
damages," and he refu
. . . a bare criminal
sufficiently protective
give rise to a private
that group." 422 U.S.
He rested the decision
protect corporate share
a subsidiary purpose o
factors are all either
implying a private cau
the CEA we have fo
legislative history that

commodity futur
other relevant fa
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directly or on re
(civil fines for, *in*
desist orders); § 6
of residents); § 5
market designati
all a case where
implying a priv
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As previously r
the dissent also a
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another of Cong
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such a failure is
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failed to act on
reasons other th
point was already
Crystal Salt Co.
(1 Cir. 1969);
Employment Sec
(Iowa 1949); ob
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just plain loss in
United States v.

283 (1947), with
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apt—"the fact t
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39 We find little
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the Commodity Exchange Act, 27 Emory L. J. 1057 (1978); Young, *A Test of Federal Sunset: Congressional Reauthorization of the CFTC*, 27 Emory L. J. 853 (1978). Some had, see, e.g., *Kelley* v. *Carr*, *supra*, 442 F.Supp. 346 (W.D. Mich. 1977), but others were hamstrung by perceived limitations in the *parens patriae* doctrine. H. R. Rep. No. 95-1181, *supra*, at 14. The addition of § 6d was designed to remove these doubts and to enlist the prosecutorial and enforcement tools of the states to aid the CFTC in correcting abuses primarily off the contract markets. See *id.* at 15 (§ 6d "is intended, among other things, to provide the several states with the power . . . to protect their citizens from persons, such as London options firms, vendors of dealer options and merchants of so-called leverage contracts who perpetuate fraudulent and other practices made unlawful by the Federal law"). See also *Luna* v. *Merrill Lynch*, *supra*, note 1 at 6-8 n.24. Since this concern was largely with off-market abuses, contract markets, clearinghouses, and floor brokers were exempted from the coverage of § 6d. See S. Rep. No. 95-850, 95th Cong., 2d Sess. 25-26 (1978) (activities of these persons "generally of the character of 'pit trading' rather than customer contact"); 124 Cong. Rec. S10561 (July 12, 1978) (Remarks of Sen. Bellmon).

Indeed, the legislative history indicates that the perceived existence of an implied private cause of action against exchanges was actually one of the reasons for their exemption from § 6d. Explaining the exemption, Senator Leahy of the responsible committee noted that:

> The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by Commission

> regulation, institution of Commission enforcemen proceedings, and *the implied private rights o action that may be brought against those contrac markets that fail to discharge their duties unde the Commodity Exchange Act.* 124 Cong. Rec S16527 (Sept. 28, 1978) (emphasis supplied).

Since Congress explicitly relied on judicially implie rights of action in fashioning the exemption in § 6d that exemption can hardly be cited as evidence of desire to insulate exchanges from such actions. See als *Smith* v. *Groover, supra,* 468 F.Supp. at 117 ("We fai to see how an apparent congressional unwillingness t *extend* the liability of contract markets suggests a intention to *abolish* such liability altogether").[40]

This analysis is enough to answer NYME's majo contention, namely, that the exemption of contrac markets from the *parens patriae* actions newl authorized in 1978 is evidence that Congress did no mean them to be subject to private actions of any sort The dissent adds two broader arguments. The first i that the 1978 amendment offered Congress a

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40 Requiring states to proceed in federal court and to notify th FCTC does not demonstrate that the 1978 Congress intended t eliminate the private suit for damages which had been recognized b its predecessors four years previously. The states were expected t act largely in an enforcement role, much as did the FCTC; moreove it would be incongruous to allow a state to proceed as *parens patria* in its own courts for a violation of federal law. Sufficient means t obtain uniformity in private litigation were afforded by th controlling effect of federal law in all CEA litigation and th possibility of referral to the CFTC approved by the Supreme Cour in *Deaktor.* Beyond this the dissent's reliance on such a slender ree as the inference to be drawn from the 1978 Congress' havin required *parens patriae* suits to be brought in federal courts wit prior notice to the CFTC is a prime example of the unreliability— frequently noted by the Supreme Court—of relying on the thinkin of a later Congress as a guide to the intentions of a former one.

opportunity expressly to affirm the private right o
action in the face of a few district court decisions tha
this no longer existed in the light of the 197
legislation and what the dissent calls "the Suprem
Court's recent but well-publicized adoption of somewha
stricter principles governing the implication of privat
causes of action." There are several answers. The first i
that in 1978 Congress was concentrating on *paren*
patriae suits; it was not considering a general revisio
of the CEA. "The logic of defendants' argument woul
be to require federal courts to prohibit private action
with respect to any statute amended in any way afte
the mid-1970's if Congress did not explicitly create
private right of action." *Navigator Group Funds, supra*
at 16. The second is that while Senator Huddlesto
cited two district court decisions which had denied
private right of action under the 1974 amendments
these were regarded as "unfortunate" and contrary t
the many others he listed that had recognized th
continued existence of such actions. 124 Cong. Rec. S
10537 (July 12, 1978). Indeed the Senator expecte
additional causes of action to be recognized under othe
provisions of the CEA in the future, a view that hardl
comports with fear of a new restrictive trend i
implication jurisprudence. The third is that the asserte
new trend in Supreme Court decisions had not ye
begun, let alone been "well-publicized". *Cort,* whic
cited with approval both *Rigsby* and *Borak,* 422 U.S. a
78, merely disallowed a private cause of action in th
case *sub judice.* It did not indicate any new trend, an
the courts have not so regarded it. As Mr. Justic
Powell noted in his *Cannon* dissent of 1979, 441 U.S. a
741, "In the four years since we decided *Cort,* no les
than 20 decisions by the Courts of Appeals hav

implied private actions from federal statutes." *Chris-Craft Industries*, 430 U.S. 1 (1977), paid ful attention to *Borak*, *supra*, 377 U.S. 426, *Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 7 (1975) had also done, and to *Superintend Insurance*, *supra*, 404 U.S. 6. The issue adversely to the plaintiffs in these cases v whether an implied cause of action existed g but whether the particular plaintiffs came wit protected class. The other cases cited are even the point. The first indication of a changed that could be detected by anyone reading the opinions without an exceedingly high powered n ing glass, not possessed even by the courts of much less by the Congress, was the 1979 opi *Cannon*—and there not in the decision, whi favorable to the plaintiff, but in footnote 6 Justice Stevens' opinion, and especially in the ing opinion of Mr. Justice Powell.

The dissent argues finally that the express co of a right of action upon the states in 1978 sho Congress thought such action to be necessary any private cause of action could exist. The ass belied by the very passage from the House Repo which the dissent quotes. There was no his recognition of causes of action by the states o of their residents; indeed the very existence of *patriae* actions for other than a state's own f loss had been called into most serious ques *Hawaii* v. *Standard Oil Co. of California*, 405 U (1972). The fact that only express legislatio overcome that decision does not at all sugge Congress meant to destroy an implied cause o by victims of proscribed practices which the cou

upheld since 1967 and Congress had recog
1974.[41]

3. Our answer to the second question posed
largely determines that to the third, "is it c
with the underlying purposes of the legislativ
to imply such a remedy for the plaintiff?" Inc
question need hardly be asked in a case wher
have found here, there is abundant evide
Congress affirmatively intended the private re
continue. If Congress clearly thought the reme
consistent, it would be of no moment that
should have doubts about this. Moreover, we h
pointed to nothing that would show how mai
of suits such as these can impede the functioni
CEA. If questions should arise in which a cou
be aided by consideration by the CFTC, the p
of a stay pending Commission consideration, w
Court directed in *Deaktor, supra,* 414 U.S. a
available. The Commission sees no inconsistenc
contrary, it tells us in its *amicus* brief (p. 15

> private damage suits under the Act are c
> and may coexist with the forums
> provided by Congress for the adjudic
> complaints of futures traders—Commissio
> tion proceedings and contract market ar
> proceedings. The Commission has caref
> monized these three rights that, in its vi

41 The list of CEA protections in the 1978 Senate Repor
95-980, *supra*, at 12-13, which the dissent, note 25, sees
of a congressional belief that no private right of acti
included only those protections *expressly* provided by th
is not at all inconsistent with the view, clearly held b
Congress, that other judicially *implied* protections e
Navigator Group Funds, supra, at 14-15.

offered a commodity trader an elect
since 1974. (footnotes omitted).

The Commission also notes that it "is
limited resources which are insufficient
police all commodity-related transactio
that the private damage remedy, in
Cannon, "is necessary or at least
accomplishment of the statutory purpos
703. Such expressions by the agency ch
administration of the statute are entitle
weight. *Cannon, supra,* 441 U.S. 706-0

4. Fortunately, little space needs to be
fourth *Cort* factor, "is the cause
traditionally relegated to state law, so t
inappropriate to infer a cause of action
federal law?", 422 U.S. at 78. The answ
the negative. The federal government h
concerned with trading in futures since
the courts have held that § 2(a)(1) of the
the application of state law. See *Interna
Ltd.* v. *Bell,* 262 Ark. 244, 566 S.W.
Bromberg & Lowenfels, *supra,* at § 4.6
supra.

Having answered the first and third C
the affirmative and the fourth in the
having found as to the second that
evidence of legislative intent to pres
remedy, we conclude, in accordance
Circuit's decision in *Curran* v. *Merrill Ly
supra,* that the district court was in e
that no private cause of action in damag

of the CEA existed. Since the district the claims under the CEA, we need which claims, if any, were within provision, § 4b, as distinguished from tion provision, § 9(b), relied on as to § 4a, relied on as to the conspirators a and §§ 5(d) and 5a(8), relied on as Although the other provisions are forward and clearly cover the activiti complaint, § 4b, to put it mildly, provision to construe. Commentators that "While the intent to outlaw fraud (A)-(C) subparagraphs, the syntactic precedes them makes it difficult to an questions about coverage." Bromber *supra*, § 452, at 82.286. Appellees are that § 4b by its terms only prohibits "a defrauding "any other person" in con making of a futures contract for or o other person. Thus, if A defrauds bro making a futures contract for C, defrauded C in connection with a futur for C, although C is not A's applicability of § 4b may well exten since it could be argued that one trad account makes a contract "for" himse fraud between two principals withi language of § 4b. The legislative

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42 The plaintiffs in the consolidated actions b persons who traded through agents, who example, and persons who traded directly for *National Super Spuds, Inc.* v. *NYME*, 77 F.R. 1977). It is not clear in every case, however within which group.

provision contains some statem
intent to protect "customers", se
73d Cong., 2d Sess. 5 (1934),
suggested as the limit of cove
ments which suggest a broad c
Rep. No. 1551, 72d Cong., 1st S
Rec. 6162 (April 27, 1936) (Rem
at 7853 (May 25, 1936); H. R
Cong., 1st Sess. 3 (1967); S. Rep
2d Sess., reprinted in 2 U.S.
News 1673, 1678 (1968). Whe
section was suggested in 1974, S
as an example of archaic lan
"simply try[ing] to convey the i
for any person to cheat or def
Hearings on S. 2485, S. 2578, S.
Before the Senate Committee
Forestry, supra, at 687 (Sen. Cla
echoing the views of a predec
section when it was proposed:
legislation is, or should be, to
fraudulent transactions. Any l
plished that end is worthy of c
Rec. 7871 (May 25, 1936) (Rema
None of the cases recognizing an
under § 4b suggest limitation t
relation. Their reasoning is b
quently cite non-§ 4b cases such
Agri-Research Council, Inc., supr
court suggested that, in line w
Insurance v. *Bankers Life & Ca*
U.S. at 12, the language of § 4b
not technically and restrictively
seriously mistaken in assuming

ily be limited to cases com
language. We deem it inad
applicability of § 4b without t
the exact relations among the
plaintiffs may find it unnec
section. It is enough for presen
counts stricken from the comp
gross violation of the prohi
§ 9(b), of the very type agai
been legislating for half a cen
The order of the District Co

MANSFIELD, *Circuit Judge* (Dis

I respectfully dissent for
Commodity Exchange Act (Act)
ing to well-settled principles of
by the Supreme Court in *Cor*
(1975); *Cannon v. University o*
(1979); *Touche Ross & Co. v. R*
(1979); and *Transamerica Mor*
Lewis, 100 S. Ct. 242 (1979), f
any Congressional intent to ap
an implied private right of a
plaintiffs-appellants (1) again
merchants and brokers (such
Commodities Inc., Thompson
closs, Kohlmeyer Inc., and Clay
Louis, Inc.), or (2) against cont
the New York Mercantile Excha
the contrary, Congress express
panoply of judicial and adm
enforcing compliance with the A

compensatory reparation
orders, and criminal pena
viewed as exclusive.

None of the sections
appellants (such as §§ 4b
U.S.C. §§ 6b, 13(b), 7(d)
even remotely suggestin
the "especial" benefit o
plaintiffs are member
considered in determini
Ash, supra, 422 U.S. at
the Act, 7 U.S.C. § 6b, t
relied on by plaintiffs
against the broker defe
enacted for the benefit
plaintiffs are *not* membe
fraud against brokers w
customer relationship. S
§ 13(b), a criminal statu
reveals that it was en
general public, which
requirement that a statu
be for the benefit of a "
Act, upon which plainti
claim against the New
essentially a licensing
things, obligates contr
certain requirements, in
manipulation. It neith
members of any class,
proscribes any conduct

The legislative history
hundreds of pages of Co
debates, fails to contain

right of action, desp
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in 1974 Congress faile
enact any one of se
expressly provided a
violations of the Act,
§ 505(a) (1974) (Hart b
bill). In 1968 Congress
have made *contract ma*
for violations of the A
Sess. § 32 (1967). M
reparations procedure
violation of the Act can
§ 14, and its legislativ
"Congress knew how to
when it wished to do s
Ct. at 248 n.13, b
reparations procedure,
provided remedies, a
aggrieved by violations
93d Cong., 2d Sess. 2
Act differs sharply fro
1934, 78 U.S.C. §§ 7
majority, which does no
proceeding to recover

Faced with this pe
intent to create or appr
majority relies on the
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U.S. 412, 419
Corp. v. Nation
414 U.S. 453, 4
Realty Corp. v.
cert. denied, 3
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> *Cort*
> [Foo
> at 6

> "While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g., J.I. Case Co. v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co. v. Redington, supra,* at [568]; *Cannon v. University of Chicago, supra,* at [688]. We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us." *Transamerica, supra,* 100 S. Ct. at 245.

If the language and structure of the statute clearly demonstrate Congress' intent, we need go no further. If not, we must attempt to fathom Congress' intent by applying the factors set forth in *Cort v. Ash.* The first of these is whether the statute indicates that it was enacted for the "especial" benefit of a particular identifiable class of which the plaintiff is a member. We may not, however, infer an intent to create a private remedy merely from Congress' expressed desire to benefit the public generally or even to benefit everyone engaged in an entire industry or line of commerce. As the Court stated in *Cannon, supra,* 441 U.S. at 690:

> "The language in these statutes—which expressly identified the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort, supra,* and other laws enacted for the protection of the general public.[13]"

Footnote 13 reads in relevant part:

> "Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large. See *Piper v. Chris-Craft Industries*, 430 U.S. 1 ('unlawful' conduct); *Cort v. Ash, supra* ('unlawful' conduct); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (duty of SIPC to 'discharge obligations'); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (forbidding 'action, practice, or policy inconsistent' with the Amtrak Act); *Wheedlin v. Wheeler*, 373 U.S. 647 (setting procedure for procuring congressional subpoena); *T.I.M.E. Inc. v. United States*, 357 U.S. 464 ('duty of every common carrier . . . to establish . . . just and reasonable rates . . . .'); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (similar duty of gas pipeline companies)."

The term "especial" benefit refers to a specific, definable class, described by the Court in *Cannon* as "a special class of which the plaintiff is a member," 441 U.S. at 689. The broader that class, the weaker is any implication of intent to provide its members with a private remedy. Otherwise the "special class" would embrace everyone.

Thus, we must carefully search the language of the statutory provisions under consideration for any expression of intent to benefit a specific group, as distinguished from an intent to benefit an entire industry, line of commerce or the public at large. Absent such expression, the possibility that Congress

intended to provide a private remedy is so slim as to be virtually non-existent.

Assuming that the statute on its face evidences a desire to benefit a special class of which plaintiff is a member, we must next examine the statute as a whole and such relevant circumstances surrounding its enactment as may shed light on Congress' intent with respect to remedies. An important consideration in this search is whether and to what extent that statute expressly provides remedies other than a private right of action for its enforcement. The failure to provide any remedies is obviously not helpful to a private plaintiff, since "implying a private right on the basis of congressional silence is a hazardous enterprise, at best," *Redington, supra*, 442 U.S. at 571. But this is not dispositive, since "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make a private remedy available," *Transamerica, supra,* 100 S. Ct. at 246. On the other hand, if the statute *does* contain other provisions for its enforcement, such as judicial or administrative remedies, which would secure most if not all of the relief sought in the private action, a private remedy will not ordinarily be implied. The Court has recently reiterated the principle of statutory construction in *Kissinger v. Reporters Committee for Freedom of the Press,* 48 U.S.L.W. 4223, 4226 (March 4, 1980), and in *Transamerica, supra.*

> "Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular

> mode, it includes the negative of any other
> *Botany Mills v. United States*, 278 U.S. 2
> (1929). See *Amtrak, supra*, 414 U.S. a
> *Securities Protection Investment Corp. v. B*
> 421 U.S. 412, 419; *T.I.M.E., Inc. v. United*
> 359 U.S. 464, 471." *Transamerica, supra,*
> Ct. at 247.

It is reasonably clear that the broader the sco
type of the expressly-provided remedies, the les
need or justification for implying an unmer
additional private remedy. In such circumstanc
highly unlikely that "Congress absentmindedly
to mention an intended private action." *Transa*
supra, 100 S. Ct. at 247 (quoting *Cannon, sup*
U.S. at 742).

Next in our search for legislative intent we
the legislative history of the statute. The most
and persuasive indicia of congressional inte
course, are Senate and House Committee R
United States v. International Union (UAW-CI
U.S. 567, 585-86 (1957); *Banco Nacional de C*
Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denie*
U.S. 956 (1968); *International Tel. & Tel. C*
General Tel. and Electronics Corp., 518 F.2d 91
(9th Cir. 1975); *American Airlines, Inc. v. CA*
F.2d 939, 949 (D.C. 1966).

Absent definitive statements on the issue of
remedy by those solons vested with primary re
bility for the statute, certain surrounding r
circumstances may shed light on Congress' inten
remedies, such as its consideration and/or rejec
an express private remedy, its statements of
standing as to the necessity or lack of it for

provision, whether an implied remedy is con
with the statute's underlying purposes and wi
other enforcement measures expressly provided
and whether the private remedy is one tradit
relegated to other tribunals, such as adminis
bodies or state courts. Most of these other c
stances, however, while of some relevance, usuall
but a weak reed upon which to rest a determina
Congress' intent. There comes a point where legi
history becomes so will-o'-the-wisp or far-fetche
respect to the matter in issue that we run the da
attributing to Congress thoughts it never actual
"The search for significance in the silence of Co
is too often the pursuit of a mirage," *Scripps-H
Radio v. FCC, supra,* 316 U.S. at 11. This e
process is particularly illusory, stultifying and u
tic where, as here, we may reasonably expect, h
the issue of a private damage remedy is so imp
that, had Congress approved or acquiesced in a
right of action, it would have said so somewhere
thousands of pages of legislative history on th

For these reasons, where it is claimed that Co
has created the significant and potentially deva
remedy of a private action for damages, under
liability could amount to hundreds of milli
dollars, primary weight should be placed
language of the statute and on clear, uneq
statements by those responsible for its enactm
the Supreme Court has recently emphasized, "a
clearly expressed legislative intention to the cor
the plain language of a statute "must ordina
regarded as conclusive." *Consumer Product
Commission v. GTE Sylvania, Inc.,* 48 U.S.L.W
4659 (June 9, 1980). Extrapolations based on go

thin fabric, requiring speculative assur
Congress' intent are to be avoided. To r
weak inferences is to indulge in judicial
as the majority states (footnote 17) was
the 1974 amendments to the Commodity
Congress makes a *"complete overhaul"*
expressly creating other remedies, it is
expect that it will indicate any intent to
important right as that to bring a priv
express grant, which would take but
rather than by silence.

A GENERAL OVERVIEW OF
COMMODITIES EXCHANGE

Before turning to the specific lan
Commodity Exchange Act, 7 U.S.C. §§ 1,
upon by appellants as the basis for t
implied private rights of action agai
commission merchants and brokers, §
U.S.C. §§ 6b, 13(b), and (2) exchange
markets, §§ 5(d), 5a(8), 7 U.S.C. §§ 7(d),
overview of the Act is helpful. Trading
futures has dramatically increased over
century, giving rise to problems of publ
such as the dangers of price manipulatio
markets and fraud by broker-dealer
customers. As these problems increased,
public supervision and control of marke
became necessary. From 1922, when Co
the Grain Futures Act to give the
Agriculture supervisory power over gra
until 1974, when the Commodity Fu
Commission Act was enacted, creating a

dent agency, the Commodity Futures Tr
sion (CFTC) with plenary and exclusive
both futures markets and traders on
Congress has gradually increased public
point where we now have an elabor
scheme designed to assure the public
orderly futures trading, and to prevent
tion, fraud and sudden or unreasonable
tions in commodity prices.

This extensive all-embracing system w
House and Senate Reports as intende
"uniform," "comprehensive," "complete"
regulatory structure. H.R. Rep. No. 93-9
S. Rep. No. 850, 95th Cong., 2d Sess.
The Act authorizes a wide variety of
nisms, including the licensing of cont
and trading personnel, and a full pano
ment powers, both administrative and j
ing procedures for the award of damages
proceedings, arbitration, imposition of c
to $100,000 for violations, issuance of c
orders with fines of up to $100,000 pe
compliance, conduct of investigations
compel attendance of witnesses and
documents, revocation of an exchange
suspension of members of exchanges
privileges, institution of proceedings in
compel compliance with orders or to enjo
the Act, and the assessment of crimina
violations of the Act and price manipu
punishable by a fine of not more tha
imprisonment up to five years, or both

Provisions for Regulation of C

Under the Act the CFTC is
power to designate contract excl
particular commodities, § 5 of
Futures contracts may lawfully b
"contract markets" as are designat
traded, §§ 4 and 4h of the Act, 7
order to be so designated as a co
continue to conduct business as su
meet rigid requirements, includ
procedures for the prevention o
§ 5(d) of the Act, 7 U.S.C. § 7(d).
places additional requirements o
including the requirement that it
that have been approved by the
Act, 7 U.S.C. § 7a(8). The CFTC
violative of the Act or of its re
exchanges to adopt additional ru
U.S.C. § 12a(7).

If a contract market violates the
of its designation the CFTC is em
revoke its designation, § 5b, § 6
§ 7b, § 8. In addition it may co
tions as it deems necessary to asce
Act, 7 U.S.C. § 12(a), issuing suc
as is needed for production of witn
§ 6(b) of Act, 7 U.S.C. § 15. The
issue its own cease and desist ord
found after hearing to be viola
regulations thereunder, and asses
to $100,000 for each violation, §
§ 13a. Refusal to comply with a C
order is a misdemeanor punisha

$100,000 or imprisonment of n
nor more than one year, or b
noncompliance. *Id.* The CFTC n
against violation of the Act or r
including an injunction or rest
existing or threatened violations
compelling an exchange to cor
U.S.C. § 13a-1. It may also direc
take emergency action to mainta
§ 8a(9) of the Act, 7 U.S.C. § 12a
subject to criminal penalties for v
price manipulation, felonies puni
fine of $500,000 and prison terr
Act, 7 U.S.C. § 13(b).

Provisions for Regu
Futures Commission

The CFTC has equally awesome
over brokers and futures co
(FCMs). It establishes requireme
brokers as futures commission me
4k, 4p, 8a, of Act, 7 U.S.C. §§ 6
Two substantive provisions of th
relevant here. Section 4a autho
quantitative limits on speculati
§ 6a, and by regulation the CFT
short trading. 17 C.F.R. § 150.1
any members of any exchange
customer in connection with a s

The CFTC is authorized to den
any person violating the Ac
manipulate commodity prices
revoke the registration of a

merchant for violations. §
may also suspend, expel
exchange member or deny
§ 8c(1) of Act, 7 U.S.C. §
abettors, § 13 of Act, 7
affirm, reverse or modify
own members, § 8c(3)
Violations of the Act and
tion are felonies punishabl
to 5 years imprisonment
$500,000, § 9(b) of Act, 7
the CFTC may issue cease
broker engaged in or att
§ 6(c) of Act, 7 U.S.C. §
tutes a misdemeanor pur
$100,000, imprisonment o
more than 1 year, or botl
obey. *Id.* The CFTC may
mandamus and injunctive
§ 6c of Act, 7 U.S.C. § 1

Provisions for
Persons Injur

The Act also provides de
compensate persons dama
Contract markets are re
arbitration procedures fo
complaints up to $15,0
employee, § 5a(11) of Act
course, contemplates a s
resolving smaller claims.

A much more comprehe
tory remedy available to

provided by § 14 of the
provides for the insti
"reparations" proceedin
includes plaintiffs here)
under §§ 6d, 6e, 6j and
futures commission merc
violation of any provis
regulation or order ther
first to review the facts
it believes these warrant
of the complaint to the
response. If the CFTC
registered merchant or
must determine the amo
the offender to pay the
its order is not sati
enforcement in the fed
complainant resides, whi
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Unless the registrant
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appeal to a federal court
to review the order, the
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Applicab

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Inc., and Thomp
Kohlmeyer, Inc.) p
§ 6d, are complet
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To the extent th
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2 As a result of th
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Rule § 44.02, whic
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Thus the Act, f
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3 Here the CFTC
Mercantile Excha
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As for defend
(opinion, p. 49) t
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can claim that we
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THE S
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its langua
v. Davis,
U.S. 551,

are speculators in the futures market, are not claiming fraud on the part of broker-dealers who handled their accounts but fraud on the part of other brokers with whom they had no relationship who allegedly participated in a conspiracy with short sellers and others to artificially depress the price of May 1976 potato futures through manipulation and excessive short sales in violation of the Act.

Section 4b reads in pertinent part:

> *"It shall be unlawful (1) for any member of a contract market* . . . in or in connection with *any order . . . for or on behalf of any other person,* or (2) *for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery . . . for or on behalf of any other person. . . .*
>
> (A) to cheat or defraud or attempt to cheat or defraud *such other person;*
>
> (B) willfully to make or cause to be made to *such other person* any false report or statement thereof, or willfully to enter or cause to be entered for *such person* any false record thereof;
>
> (C) willfully to deceive or attempt to deceive *such other person* by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for *such person."* (Emphasis added.)

Only the person on whose "behalf" a contract is made by a member is protected by § 4b from the fraud and deceit on the part of that member in the making of a

futures contract. The "person" is the customer for whom the futures contract is made. The introductory paragraph defines the subject matter of the action in terms of a "contract of sale . . . for or on behalf of any other person." Subsections (A), (B) and (C) then limit the prohibited activities to certain forms of fraud by the broker upon "such other person" (i.e., his customer). The offense, therefore, exists only when a member cheats or defrauds *his own customer.*

Nowhere does § 4b mention parties having no connection to the contract. Nor, despite the majority's effort to strain a broader coverage out of the section's language, is there any indication that Congress intended to create the massive liability that would result if broker-dealers were made liable to every trader active in the market at a given time. See *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 733 n.5 (1975) ("The wording of § 10(b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large" (emphasis in original)). The express mention of customers only as beneficiaries, just like the mention of purchasers and sellers in *Blue Chip Stamps,* negates any intent to include anyone else.

There is no support in the legislative history for the majority's broad reading of § 4b. To the contrary, language in relevant House Reports indicates just the opposite. The 1934 House Report on what was to become § 4b states:

> "Section 4b prohibits traders in acting *for customers in futures transactions to cheat, defraud, or deceive customers,* or to bucket or offset such

orders against orders for others." H. R. Rep. No. 1637, 73d Cong., 2d Sess. 5 (1934). (Emphasis added).

The 1935 House Report confirms that interpretation:

"Section 4b makes it unlawful for members of contract markets, and correspondents, agents, and employees thereof, in connection with orders to make or the making of contracts of sale of any commodity in interstate commerce to cheat, defraud, or deceive *the customer,* or to bucket the order." H. R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935). (Emphasis added).

The legislative history of the 1968 amendments also refutes the majority's contention. Speaking in support of legislation to amend § 4b, Representative Hathaway introduced the testimony of Assistant Secretary of Agriculture Mehrens, who had testified before the House Committee on Agriculture, stating in part: "We ask that this provision [§ 4b] be expanded to cover all persons who handle *customer* orders or funds. . . . The proposed legislation . . . would . . . give *customers* who deal in commodity futures with nonmembers the full protection of the Act." 113 Cong. Rec. 23651 (Aug. 22, 1967). See S. Rep. No. 947, 90th Cong., 2d Sess. 6 (1968). There was no indication that non-customers, such as plaintiffs here, were entitled to invoke the section against third parties who were not their brokers or fiduciaries. See in accord, *Chipser v. Kohmeryer & Co.,* 600 F.2d 1061, 1065 (5th Cir. 1979) ("Section 4b makes it unlawful for a commodities broker to 'cheat or defraud' a *customer* or willfully deceive or make false statements or reports to a *customer* in connection with

transactions on the commodities exchange." (Em
added)).

Aside from the fact that § 4b is limited to prot
of customers against fraud on the part of broker-d
acting on their behalf, there is nothing in the s
indicating that Congress intended to provide even
customers, much less others such as appellants,
private civil remedy against broker-dealers. Th
preme Court has repeatedly stated that before a p
right of action will be implied it must be shown
"necessary" to effectuate Congress' purpose. *Ch*
Corp. v. Brown, 441 U.S. 281, 317 (1979) (private
of action not necessary since plaintiffs ha
alternative remedy); *Piper v. Chris-Craft Indu*
Inc., 430 U.S. 1, 41 (1977); *Santa Fe Industries,*
Green, 430 U.S. 462, 477 (1977). Here a private r
would not be necessary to enforcement of § 4b,
the existing administrative procedures provided
Act, including the award of reparations, amply p
the customer. The creation of an implied p
judicial remedy would not only be unnecessar
would run counter to Congress' established rem
since the customer could hardly seek damages in
court action without waiving his right to recov
same damages in a reparations proceeding. A p
right would therefore be duplicative.

Nor does the language of § 9(b) of the Act, 7
§ 13(b),[5] the other section of the Act relied

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5 Section 9(b) reads:

"(b) It shall be a felony punishable by a fine of not m
$500,000 or imprisonment for not more than five years,
together with the costs of prosecution, for any p
manipulate or attempt to manipulate the price of any co
in interstate commerce, or for future delivery on or subje
rules of any contract market, or to corner or attempt

plaintiffs, sustain a private right of action here. criminal statute to be enforced by criminal penal was specifically recognized by Congress wl amended the provision in 1936. H.R. Rep. N 74th Cong., 2d Sess. 9 (1935). There is no langu § 9(b) even remotely suggesting that it was enac the "especial" benefit of a special class of plantiffs are members. Indeed, the statute ma reference to any beneficiaries at all. Like § 206 Investment Advisors Act construed in *Transa supra,* it "simply proscribes certain conduct, an not in terms create or alter any civil liabilities." Ct. at 247. To spell a private right of action out a general criminal statute would permit anyor claimed to have been injured by a violation of t to sue, regardless of Congress' intent. The Su Court "has been especially reluctant to imply ca action under statutes that create duties on the persons for the benefit of the public at large," *C supra,* 441 U.S. at 692 n.13; *Cort v. Ash, supr* U.S. at 79-80 (18 U.S.C. § 610, prohibiting co contributions), and it has rarely implied a ca

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any such commodity, or knowingly to delivery or cau delivered for transmission through the mails or in i commerce by telegraph, telephone, wireless, or other communication false or misleading or knowingly i reports concerning crop or market information or condit affect or tend to affect the price of any commodity in i commerce, or knowingly to violate the provisions of secti 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or kno make any false or misleading statement of a material fa registration application or report filed with the Comm knowingly to omit in any application or report any mat that is required to be stated therein. Notwithstan foregoing, in the case of any violation described in the sentence by a person who is an individual, the fine sha more than $100,000, together with the costs of prosec

action under a criminal statute. *Chry*
Brown, supra, 441 U.S. at 316. Despite
protestations, this is not one of those r

Nowhere else in the language or str
Commodity Exchange Act can one find
implied intent to benefit a special cla
commodity speculators such as plainti
reason is that the Act was not enacted for
benefit of any particular class but to pro
and primarily producers and customers,
sudden or unexplained fluctuations in
commodities, which could ruin produce
serious hardship to consumers, process
disers, millers, dealers, and shippers. T
clear by Congress in its declaration of
policies underlying the Act, found in § 3
U.S.C. § 5, which has remained virtual
since its enactment in 1922. Section 3

> "Transactions in . . . 'futures' are
> national public interest; . . . the pri
> such transactions are generally qu
> seminated . . . as a basis for de
> prices to the producer and the
> commodities and the products an
> thereof and to facilitate the moveme
> interstate commerce; such transactio
> by shippers, dealers, millers, and oth
> handling commodities and the
> byproducts thereof in interstate c
> means of hedging themselves agains
> through fluctuations in price; the tr
> prices of commodities on such board
> susceptible to speculation, manipula
> trol, and sudden or unreasonable

> the prices thereof frequently occur
> such speculation, manipulation, or
> are detrimental to the producer or
> and the persons handling commodi
> ucts and byproducts thereof in inters
> and such fluctuations in prices are
> to and a burden upon interstate
> commodities and the products ar
> thereof and render regulation impe
> protection of such commerce and
> public interest therein."

Congress' solicitude was recently su
testimony in 1974 of the Administ
Commodity Exchange Authority (the
CFTC), Alex Caldwell, before the Sena
considering proposed amendments to th

> "Originally back in 1922 it was
> Congress that the Commodity Exch
> designed to protect producers. It is
> that it is not designed only to prot
> but also the merchandisers and
> ultimately the consumers." Hearings
> 2578, S. 2837 and H.R. 13113 Bef
> Committee on Agriculture and
> Cong., 2d Sess. at 234 (1974).

The congressional debate on the 197
amply confirms that the Act was not de
especial benefit of speculators. Represent
member of the Committee on Agricultur
stated "The purpose of the legislation b
can best be described as a means for
fairest possible market for legitimate

H.R. 13113 will provide those
reasonably necessary to guide th
tors . . . and no legitimate sp
object to its provisions." 80 Cong.
1974). Representative Zwach, a
Committee, stated "This legislatio
umpire, a commission that wi
interests, the producers' inter
interest." *Id.* at 10740. Represen
that "Our experiences . . . demo
effects which unfair trading p
consumers and producers alike."
Senator Scott claimed that "For t
will mean that commodity pric
reflect demands and actual availa
of speculation which places artif
will be under close scrutiny. T
realistic prices for the farmer and
break for the consumer will likev
rapid increase and decrease in de
30467 (Sept. 9, 1974).

Although speculators were reco
the extent that they might, b
volume and assuming market
liquidity in the market for the be
consumers and thus hopefully m
tions to achieve some of the
stability considered beneficial, Co
a dim view of speculative activi
futures market because of the
posed to farmers, producers, c
shippers and hedgers. Unlike a
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interest in the cash market for it,

as a means of minimizing his risk
as plaintiffs here, has no underly
market. He merely attempts to p
of prices for commodity future
attitude toward the benefits
speculators is further demonstr
§ 3, which outlines the Act's
speculators or investors as benef
does refer expressly to the inte
"consumer," "shippers, dealers,
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omission explained by the majo
Congress desired to state a com
the legislation. If speculators
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consistent with a desire to i
Clause.

The various House and Senate
its various amendments over the
the plain language of § 3.
Committee stated with respect
Futures Act of 1922 (the first v
become the Commodity Exchan

> "It is believed that this b
> obvious abuses that are p
> changes, result in more
> thereby enable the *producers*
> the market price for the
> possible in the past.
>
> *"Its primary purpose is t*
> *market some of the und*
> *professional speculators.*

> "In addition to curb
> manipulation, the bill
> Agriculture to provid
> of the exchanges fr
> misleading reports o
> conditions. This in it
> activities of professi
> added). S. Rep. No. 2
> (1921).

In 1936 the Senate Rep
ments stated:

> "It is of utmost im
> adopted whereby the
> position to protect t
> generally against abu
> trolled speculation on
> 1431, 74th Cong., 1s

The 1936 House Report
President Roosevelt's first
urged Congress to elimina
destructive speculation" an
the use of exchanges for s
H.R. Rep. No. 421, 74th
78 Cong. Rec. 2264 (193

> "The fundamental pu
> insure fair practice
> commodity exchanges
> control over those f
> which too often den
> injury of producers
> exchanges themselves

"Since the passage o
of 1934 there has
tendency on the part
transfer their acti
markets, a tendency
this bill without fu
tance." *Id.* at 2.

The 1974 House Rep
President Roosevelt's att
No. 93-975, *supra*, at (i
both 1974 and 1978 used
the above quoted langu
Report. S. Rep. No. 113
(1974); S. Rep. No. 850, 9
The majority contends t
injury to the "markets th
protect speculators. But
legislative history refute
intended to protect excha
own members and oth
speculators from thems
supra, at 14; S. Rep. No
Throughout all these
nizes, the congressional
vituperative attacks on
1922 and 1936, e.g., 61
(1921) (Remarks of Senat
is to survive, "the grain
Cong. Rec. 7857 (1936)

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[6] As stated by this court in
550 F.2d 762, 768 (2d Cir. 1
Act is the elimination of wr
It is they, not the exchange

that "the grain p
increased if the w
controlled"). Congr
though tempered,
113 Cong. Rec. 3
Representative Su
futures . . . has
surges in the futu
increases in consu
(Sept. 9, 1974) (Re
gives the comm
inflationary price
demand—but are

Moreover, it h
Congressmen repr
consistently oppos
tion of the commo
it is they who are
No. 1522, 73d Cor
H.R. Rep. No. 93-
report) ("We believ
a lack of faith in
. . ."); 120 Con
(Statement of Re
"more not less"
investors do benefi
a far cry from con
their "especial be
"Speculation may r
beauty and a joy
(August 11, 1967)
Agriculture Mehre
Agriculture, quote
sentative Smith in
that speculation w

"When the
Federal regu
Act—it was
gamblers wo
the liquidity
could readily
"The Comm
limit and reg
with hedging
or unreason
which are
consumer an
. . .' Clearly
permits com
those who
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primary purp
1974).

Thus, given th
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especial benefit
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of Congress. Nor
or of its provision
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The Court's langu
Inc., supra, 430

"As previou
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Ibid. T
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Accord, *Li*
1979) (not
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Thus § 9(b), like § 4b, does not disclose any desire to benefit a special class of which plaintiffs are members. When read in the light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors.[8] In any event,

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history does show an intent to offer *some* protection to speculators, there is no suggestion that Congress enacted the statute for the *especial* benefit of speculators or intended to confer a private right of action in favor of speculators. Indeed, the legislative history is just to the opposite; Congress was primarily concerned about producers and consumers.

The majority's reliance on our decision in *Ames v. Merrill Lynch, Pierce, Fenner & Smith*, 567 F.2d 1174 (2d Cir. 1977), as supporting a private right of action is similarly misplaced. There the dispute involved a *customer and his broker* and we declined to compel arbitration, noting that "on this appeal, we are not called upon to decide whether the complaint states a claim for relief." *Id.* at 1176. Thus, the court's passing statement that the Act was enacted for the protection of "investors" has no bearing whatsoever on the question before us, whether the Act was designed for the especial protection of these plaintiffs, who are speculators, not customers.

Footnote 25 of the majority opinion suggests that regulated persons may belong to the class for whose special benefit a statute is enacted, with which we do not disagree. However, where (as here) Congress has specifically enumerated the persons for whose benefit the statute has been enacted (i.e., the public, producers, consumers, shippers, dealers, millers and hedgers) but has studiously omitted speculators, we may reasonably infer that Congress did not intend to include speculators among the benefited group.

8 Some of the plaintiffs here also allege that the defendant brokers have violated § 4a of the Act, 7 U.S.C. § 6a. Section 4a states in relevant part that "Excessive speculation in any commodity under contracts of sale of such commodity for future delivery . . . causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, *is an undue and unnecessary burden on interstate commerce in such commodity*" and authorizes the CFTC to fix quantitative limits on trading "for the purpose of diminishing, eliminating, or preventing such burden. . . ." (Emphasis added). The CFTC has set by regulation certain limits on short trading which are alleged to have been violated by the short sellers with the knowledge of their brokers. 17 C.F.R. § 150.10.

No court has ever found a private cause of action to exist under § 4a. The section serves as a general prohibition against excessive

even assuming *arguendo* that this criminal statute benefits speculators, there is not the slightest suggestion in the language or legislative history of § 9(b) that Congress impliedly intended it to be enforced by private civil suits for damages. The remedies provided by Congress are found elsewhere in the Act.

(2) *Sections of Act relied on by plaintiffs to support claims against the contract market defendant.* (§§ 5(d), 5a(8) and 9(b), 7 U.S.C. §§ 7(d), 7a(8) and 13(b))

Appellants rely upon portions of §§ 5 and 5a of the Act, 7 U.S.C. §§ 7 and 7a, and to a lesser extent on § 9(b), 7 U.S.C. § 13(b), already discussed above, as the

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speculation in commodity futures and its purpose—the removal of the burden of excessive speculation on interstate commerce in order to stabilize the price of the commodity itself, not the price of the future contract—is clearly described. The plain language of the section, then, indicates that it was designed for the protection of the general public. Nor is there any suggestion that Congress intended to confer any private right of action upon any person, let alone a speculator, who might be claimed to be damaged as a consequence of a violation of the section. See *Transamerica, supra*, 100 S. Ct. at 247; *Kissinger, supra*, 48 U.S.L.W. at 4226. Only one case has even addressed the issue of an implied cause of action under § 4a and it concluded that investors were not within the class of persons for whose especial benefit the statute was created, reasoning that "the excessive speculation provision is primarily intended to protect outsiders from the activities of all speculators, not speculators from themselves." *Liang v. Hunt*, 477 F. Supp. 891, 893 (N.D. Ill. 1979).

Plaintiffs also charge that the defendant brokers violated Exchange Rule § 44.02 by failing to have liquidating orders placed within five minutes after the close of the trading limits even though they knew or should have known that their customers could not deliver potatoes. Since it is now well recognized that a private right of action may not be implied for a violation of a rule of the New York Stock Exchange, *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980), it is not surprising that the majority makes no effort to claim that plaintiffs here have a cause of action against the brokers for their alleged violation of Exchange Rule § 44.02. Accordingly, we need not address the issue.

source of an implied private right of action against New York Mercantile Exchange and its officers. Section 5 is a licensing statute which imposes upon the CFTC the duty of designating boards of trade as "contract markets" provided they comply with specified conditions and requirements, including in subdivision 5(d) "the prevention of manipulation of prices and the cornering of any commodity by the dealers and operators" upon the Exchange.[9] Section 5a, 7 U.S.C. § 7a, provides that each contract market shall comply with 12 requirements, including the enforcement of its own rules, regulations and resolutions which have been approved by the CFTC, § 5a(8) of the Act, 7 U.S.C. § 7a(8).[10]

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9 Section 5 provides in relevant part:

"The Commission is hereby authorized and directed to designate any board of trade as a 'contract market' when, and only when, such board of trade complies with and carries out the following conditions and requirements:

a. [when it is located in a terminal market where any cash commodity is sold in sufficient quantities so that futures contracts fairly reflect the general value of the commodity]
b. [when it provides for the filing of reports concerning the transactions occurring on the exchange]
c. [when it provides for the prevention of the dissemination of false information by the board or any member]
d. When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board. . . ."

10 Section 5a(8), 7 U.S.C. § 7a, reads in relevant part:

"§ 5a *Duties of contract markets*

"Each contract market shall—

* * * * *

"(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have

Plaintiffs here allege that the New York Me
Exchange violated the Act and the Regulati
failing (1) to maintain an orderly market for trac
to report violations, (3) to direct the er
liquidating orders, (4) to declare an emergency
extend the period for delivery or to allow deli
truck, (6) to buy potatoes for the account o
sellers who did not make delivery as required b
contracts, and (7) to perform its duties as a c
market, including exercise of due care t
manipulative practices.

As the Court pointed out in *Cannon, supra,* 4
at 690 n.13, a statute will ordinarily be consti
creating an implied private remedy only wh
"explicitly conferred a right directly on a cl
persons including the plaintiff in the case." He
prescriptive language of § 5 and § 5a, like the re
statute in *Redington, supra,* 442 U.S. at 569, "d

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been approved by the Commission pursuant to paragrap
this section; and revoke and not enforce any such by
regulation, or resolution, made, issued, or proposed by it
governing board thereof or any committee, which
disapproved by the Commission; . . ."

In addition to subsection (8), § 5a requires contract mark
furnish the CFTC with copies of its by-laws and regulatio
records of all of the proceedings of its governing board, (2
the operators of the warehouses to keep records and ma
available for inspection by the CFTC, (3) obey CFT
concerning the delivery of the cash commodity, (4) require
making delivery to furnish notice of intended delivery to
obligated to accept delivery, (5) require that warehouse re
accepted as satisfaction of debt, (6) enforce its by-l
regulations relating to the minimum financial standards re
those future commission merchants who are members of the
(7) permit delivery of any commodity in a location which wi
prevent price manipulation, (8) provide for an arbitration p
for customer grievances, § 5a(11), and (9) submit to the C
approval its by-laws, rules, regulations and resolutions. §

by its terms, purport to create a private cause o
in favor of anyone." Neither provision "grants
rights to the members of any identifiable cla
proscribes any conduct as unlawful," *id.* They th
cannot support a private cause of action in f
these plaintiffs.

Nothing in the foregoing sections of the Act p
any basis for an inference that they were enac
the especial benefit of plaintiffs, much less
private right of action was intended. Here
Congress' adoption of a battery of other
remedies indicates it had no intent to create or
an implied private right of action against exc
See *Transamerica, supra,* 100 S. Ct. at
Although exchanges may not be the sub
reparations proceedings, if they violate the
CFTC may suspend or revoke their designa
contract markets, §§ 5b, 6(a) of the Act, 7 U.S.C
8, sue in federal courts, which are expressly vest
jurisdiction, to enjoin violations, 6c of the Act, 7
§ 13a-1, assess civil fines of up to $100,000 f
violation and issue cease and desist order
compliance with which subjects the market
officers to a $100,000 fine or imprisonment. § 6
Act, 7 U.S.C. § 13a. The exchanges, of course,
subject to criminal penalties of up to a $500,0
and 5 years imprisonment for violations of the
price manipulation. § 9(b) of Act, 7 U.S.C. § 1

Lastly, in 1968 Congress failed to enact a bil
would have made contract markets liable to ap
persons for violations of the Act. H.R. 917
Cong., 1st Sess. § 32 (1967); see Statem
Representative Fino introducing the bill, 113
Rec. 10839 (April 26, 1967). This indicat

Congress did not intend to sanction a
against exchanges.[11]

OTHER CIRCUMSTANCES POSSIBI
ON LEGISLATIVE INTENT TO C
APPROVE AN IMPLIED PRIVAT

(1) *Pre-1974 lower federal court deci*
private rights

Faced with the fact that nothing in
the Commodity Exchange Act, the vario
of it over the years, and its legislati
remotely suggests congressional inte
much less create, an implied private rig
majority relies almost completely on the
to the 1974 amendments various lower
beginning in 1967, had implied certain
rights of action under the Act and
failure, in face of these decisions,
extinguish or nullify these decisions m
evidence of an intent *sub silentio* t
continued implication of private acti
Act.[12] In short, the argument goes, in an

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11 Significantly, the 1968 amendments consiste
these, 13 sections and 3 subsections are ider
Representative Fino's bill, Pub. L. No. 90-258 §
9, 10, 11, 13, 14, 15, 18, 19, 22, 30, 34; 82 Sta
and 8 sections and 2 subsections are alter
provisions, Pub. L. No. 90-258 §§ 2, 4, 5, 7(b),
25; 82 Stat. 26, *et seq.* (1968). This indica
Congress acted with discrimination and care i
provision authorizing private damage suits.

12 *Anderson v. Francis I. duPont & Co.*, 291 F.
Minn. 1968); *Hecht v. Harris, Upham & Co.*, 28
(N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9t

in 1974 Congress had the burden of tal
action to disapprove implied private
some courts to have existed under the
absence of its doing so, the holdings of
may be presumed to survive.

The argument puts the cart before th
as here, Congress has expressly provi
and administrative means of enforcemer
on plaintiffs to show a clear and affir
sional intent to approve a private right
Congress or defendants to show tha
provided by it are exclusive. *Transame*
S. Ct. at 247; *Securities Investors Pro*
Barbour, supra, 421 U.S. at 419; *Amt*
U.S. at 458. The issue is whether Cong
approve a private right of action, not
majority frequently states, maj. opin.
intended to "destroy" or "eliminate"
private right, which assumes the matter
Nor may we simply presume that C
silence intended to approve a "pre-e
right of action, since the Supreme Court
that "in the absence of the clearest

Egg Producers v. Bauer International Corp.,
1384 (S.D.N.Y. 1970); *Booth v. Peavey C*
Services, 430 F.2d 132, 133 (8th Cir. 1970); *Mc*
& Co., 340 F. Supp. 1338, 1343 (E.D. La. 1972)
(5th Cir. 1973); *Gould v. Barnes Brokerage Co*
294, 295 (N.D. Tex. 1972); *Johnson v. Arth*
Hamil & Co., 341 F. Supp. 764, 766 (S.D.N.
Bache & Co., 377 F. Supp. 61, 65 (M.D. Pa. 19
Schreiber & Co., 479 F.2d 529, 534 (7th Cir.), *r*
sub nom., Chicago Mercantile Exchange v. De
(1973) (per curiam); *Seligson v. New York Prod*
Supp. 1076, 1084 (S.D.N.Y. 1974), *affd. sub*
York Produce Exchange, 550 F.2d 762 (2d Ci
U.S. 423 (1977).

Congress intended that" a new
serve" a pre-existing private cau
"decline" to imply one under the
Inc. v. United States, supra, 359
otherwise is to stand the princip
the more recent Supreme Cou
heads. Quite apart from this fu
argument must be rejected for t
examination of the decisions a
relied on by the majority demons
support a *sub silentio* intent by
approve implied private rights c

In the first place the earlier de
history do not reveal any long-re
of action in favor of speculato
against contract markets or brok
the speculators had no custom
For 45 years prior to the first de
majority the provisions of the Ac
through use of the administr
available to the Secretary of
Commodity Exchange Commissi
the CFTC, and through crimir
upon violations of the Act. Des
the manipulation of the onion
1950's, see S. Rep. No. 1631,
1958), reprinted at 1958 U.S. Co
4210, 4214, the salad oil swindle
Miller, The Great Salad Oil Sw
publicized schemes to manipul
defraud participants, and despit
private right of action under the
as 1944, *Baird v. Franklin,* 141 F
denied, 323 U.S. 737 (1944), n

suggested that a private cause
might exist.[13] Even the Commo
sion believed that administrativ
penalties were the only means
be enforced. See letter from Dep
Commodity Exchange Author
1958, to counsel for the
Agriculture and Forestry, repri
Cong. & Admin. News 4216.[14]

Goodman v. H. Hentz & Co.,
Ill. 1967), was the first case to
significant not because it was th
the case on which all of the lat

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13 The majority opinion (footnote
statement as implying that "victims
never resorted to the federal cour
whereas we actually state that prior
held that a private cause of acti
recognized. There may well have beer
the claims made in these suits is not
prior to 1967 no court to our know
here, i.e., the existence of an implie

14 The letter reads in relevant part:

"Dear Mr. Stanton [Counsel
United States Senate.]

. . .

"You requested a memorandun
absence from these bills of any p
the Commodity Exchange Act
proposed section 4j a violation of

"As you recognize, in the abs
violations of the proposed section
statute, it would appear that th
afforded by the act would b
complaints. [Emphasis added].

"Sincerely,

Rodger R.
Administ

private cause of action s
were lower federal court
never passed upon the is
brought under § 4b by
broker-dealer in which
frauded by the broker-d
§ 286 of the Restateme
customers fell within th
intended to protect w
customers) and that vic
statutory tort for which
remedy. The court als
Wheeldin v. Wheeler, 3
which stated that private
legislature evidences a co
indication in the Com
Congress intended not to
by violations access to th
the court implied a priv

It hardly merits discus
current law, was wrongly
purport to consider, as r
Cannon, Redington, Tra
earlier by *Cort v. Ash*,
create a private right of
Indeed, the Court has
rationale relied upon in
of Congressional intent
action. See, e.g., *Reding*
578, quoting *Cannon*, s
significantly, perhaps, is
been incorrectly decided
The proposition that a p
implied unless Congress

unsupported by any
accurately reflect the sta
existed. Even *J.I. Case*
426, widely considered
Supreme Court has gon
cause of action, required
the *Goodman* court. The
whether a private right
effectuate Congress' inte
at 432.

Nor can we presume th
decision simply because
which private rights of a
by the courts. The majo
which courts were ther
action, ignoring such case
U.S. 647 (1963); *T.I.M.*
U.S. 464 (1959); *Monta*
Northwestern Public Ser
General Committee v.
(1943); *General Committ*
U.S. 338 (1943); *Swit*
Mediation Board, 320 U
rejected such claims of p
area of securities, the c
action. E.g., *Colonial Rea*
F.2d 178 (2d Cir.), *cert.*
O'Neill v. Maytag, 339 U

The majority contends,
of the *Goodman* decisio
following it, is irrelevant
instead is whether Congr
correct when it enacted
even accepting this prop

approval of thes
history of the 1
less mention of
Moreover, the lo
majority do not
decided prior to
against their b
speculators like
whom they had
Francis I. du Po
1968); *Hecht v. F*
(N.D. Cal. 1968)
1970); *Booth v.*
430 F.2d 132 (5t
Shearson, Hamil
1972); *Gould v.*
Supp. 294 (N.D.
Co., 340 F. Supp
113 (5th Cir. 197
Supp. 61 (M.D. I
recent decision, (
and Smith, Inc.,
12, 1980), relied
of this case since
against his broke
Although § 4b
protecting custo
brokers, it certa
plaintiffs here,
persons with wh
ship.

To be sure, th
action in favor
against his broke

purpose of infe
ceived" the state
1974. In *United*
Corp., 311 F. S
relying on *Good*
§ 9(b) of the A
producers, not c
injunctive relie
company to pre
investment infc
Produce Exchan
affd. sub nom.,
Cir.), *cert. deni*
relying on *Deak*
was available to
a trader, against
case, however, w
the 1974 amend
aware of it. It
majority's theor
thought it unn
private right of

Thus plaintiff
L.D. Schreiber &
other grounds s
v. Deaktor, 414
year before the
support for the
There a trader
violation of § 5a
Goodman, found
interests of th
implied a cause
§ 5a(8). Althou

Supreme C
support fo
right of ac
the Court
held that
not throug
Supreme C
serious er
hidden ind
issue after
Deaktor is
In specu
"perceived"
implied rig
must take
not finally
December
decision in
January 9,
implied pri
relying on
its express
"when leg
remedy or
coverage o
414 U.S. a
The maj
"[d]uring t
widespread
implied ca
provisions
opinion, p.
infer that
assumed th

of action under the Commodity Exchange Act as they had under the securities laws. That argument has a number of serious flaws.

First, the Supreme Court in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 2, 13 n.9 (1971), merely acquiesced in the *25-year old* acceptance by the lower courts of an implied private right of action under § 10(b) of the Securities Exchange Act. See *Cannon, supra,* 441 U.S. at 690-93, n.13, which suggests that absent that long-standing prior interpretation the Supreme Court would not have found a private right of action under § 10(b). Since there is no such long-standing history of judicially implied rights under the Commodity Exchange Act, there is simply no basis for inferring that Congress could have assumed that the Court would similarly acquiesce in a private right of action under that Act.

Second, the majority seems to suggest that, because a number of the early securities cases implied a private right of action under the securities laws even though those laws contained express remedies, Congress could assume that the courts would similarly imply a private right of action under the Commodity Exchange Act, which also contains a number of express remedies. That is simply not the case. In *Baird v. Franklin,* 141 F.2d 238, 244-45 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944), heavily relied on by the majority, Judge Clark implied a private right of action under the Securities Exchange Act of 1934 because the express remedies were merely punitive and remedial, not compensatory. Section 14 of the Act here, in marked contrast, expressly provides for compensatory damages. Since the securities laws provide for less complete remedies than the Commodity Exchange Act, any analogy between the judicial history

of private rights of action under the securities laws and the Commodity Exchange Act is bound to be of limited relevance.

Third, the majority seeks to distinguish such cases as *Transamerica, supra,* 100 S. Ct. 242, and *Redington,* 442 U.S. 560, on the ground that the 1974 Amendments were passed well after the "great explosion" of judicially recognized private rights of action. The majority, however, ignores the fact that the sections of the Act most heavily relied on by plaintiffs, §§ 4b, 9(b) and 5d, were all enacted in 1923 and 1936, well before any "explosion" in private rights of action. Like the statutes in *Redington* and *Transamerica,* nothing in the legislative history of 1923 or 1936 indicates that Congress intended to create a private right of action under any of the provisions relied on by plaintiffs.

As the law existed prior to 1974, then, the majority's contention that the courts had long recognized a private right of action in favor of these plaintiffs rings hollow. The Supreme Court had never spoken on the subject. No lower federal court had implied a cause of action under § 5(d), § 5a(8), or § 4a. Nor had any court implied a cause of action in favor of one not a customer against a broker-dealer under § 4b. *Deaktor,* which implied a cause of action in favor of a speculator against an exchange under § 9(b), had been decided less than a year before the enactment of the 1974 amendments. This decision, which was never mentioned in the congressional debates as a basis for an implied right of action, is the sole case which could conceivably be relied upon as pre-1974 authority for the proposition advanced by the majority here that Congress "perceived" the private rights of action to be available under the Act in favor of speculators against brokers or

exchanges. It seems most unlikely that Congress had even heard of it, much less relied upon it, in adopting the 1974 amendments. Given the crucial importance of *Deaktor* to the majority's argument, Congress' failure to mention *Deaktor* is highly significant, despite the majority's protestations to the contrary. Absent some indication that Congress knew that a lower court had implied a private right of action in favor of a *speculator against an exchange,* as opposed to its possible knowledge that the court had implied a private right of action in favor of a *customer against his broker under § 4b,* we simply cannot presume that Congress was aware of *Deaktor,* let alone silently approved of the private right of action it found.

(2) *References in Congress to Private Civil Suits*

The majority next relies upon a few scattered references to private civil actions in the course of hearings by House and Senate Committees with respect to the proposed 1974 amendments. None of these, however, reveal any approval or ratification of such rights. Indeed the evidence is overwhelming to the contrary.

The Senate

Not a single mention of private civil actions is to be found either in the Senate Committee Report with respect to the 1974 bill or on the Senate floor. The only references during the lengthy Senate hearings were those of Senator Clark, Professor Schotland of Georgetown University, and Ms. Judy Jackson, a representative of the Consumer Federation of America, with respect to a provision in a bill introduced by Senator Hart which would have expressly authorized private

civil suits for violations of the Act, S. 2837, § 5
and treble damages for willful violations, § 5
During the Senate hearings on various proposed
including the Hart bill, H.R. 13113 (the already p
House bill), S. 2485 (the Humphrey Bill) and S.
(the McGovern Bill), numerous witnesses specif
addressed the Hart Bill and vigorously urged tha
Committee adopt the private right of action pro
by it. Commodity Futures Commission Act: Hea
Before the Senate Committee on Agriculture
Forestry on S. 2485, S. 2578, S. 2837, and H.R. 1
supra. Professor Schotland stated that it was "ha
be emphatic enough in favor of [§ 505]" and
"private citizen action for self protection, with
judicial protections, is an enormous step toward he
assure vigorous regulatory action," *id.* at 737, 747
Judy Jackson noted that neither the Humphrey Bi
the House bill contained any provision for private
actions; *id.* at 369. Senator Clark, co-sponsor o
Hart Bill and a member of the Committee, *id.* at
spoke in support of private treble damages unde
bill. Professor Schotland warned about the nee
explicit language approving private rights of actio
stated that if Congress decided to adopt the repara
procedure and place "such virtually unpreced
responsibility and burden in this regulatory body,
should be explicit language in the statute that Fe
and State courts are still open if a complainant pr
to go to trial there," *id.* at 737, 747.

Congress rejected the bills. Under a princip
statutory construction expressly endorsed by
Supreme Court in *Amtrak, supra*, 414 U.S. at 4
decision ignored by the majority on this point, wh
here Congress has before it a specific propos

authorize private rights of action and after f
careful consideration declines to adopt that prop
action must not be treated as evidence of in
approve private rights of action, but rather as a
to preclude them. Moreover, its action certainly
the majority's argument that Congress intend
silentio to encourage the lower courts to cont
imply private rights of action.

It is suggested that Congress refused to ad
private right of action proposals because
opposition to treble damages. But this was
position articulated by any lawmakers, who ob
could have eliminated the treble part of the d
with the stroke of a pen and left standing the p
for compensatory damages. The Senate instead
reject the proposition that civil monetary dam
recoverable in any action other than a repa
proceeding.[15]

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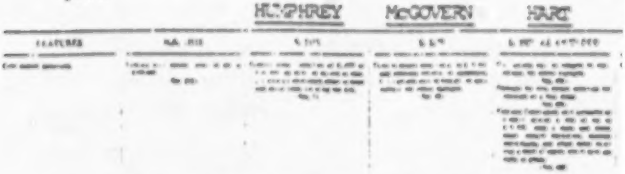
15 Indeed, the Senate had before it a chart comparing the
of the four bills under consideration, a chart that on
reference to the possibility that private damage suits wer
under the existing Act. The comparison chart reads in
part:



Commodity Futures Commission Act: Hearings before
Committee on Agriculture and Forestry on S. 2485, S. 257
and H.R. 13113, *supra*, at 194. Representative N
introduced a bill in the House, which like Senator McGo
expressly created an action for treble damages. H.R. 1
Cong., 1st Sess. § 17 (1973). In 1974, Rep. Smith in
similar bill which provided for the reparations procedure
eventually enacted as § 14, but deleted the provision
damages. H.R. 11195, 93d Cong., 2d Sess. (1974).

The House

Turning to the history of the legislat
House, the latter's Report with respect to
only two references to an implied pr
action, neither of which evince an intent
preserve that right. The Report stated
the 1968 amendments, which requ
markets to enforce their own rules a
designed to strengthen self-regulation
worked to weaken it because, as the C
informed,

> "[A]ttorneys to several boards of tr
> advising the boards of trade to redu
> exchange regulations designed t
> trading, since there is a growing b
> that failure to enforce the excha
> violation of the Act which will su
> private litigants." H.R. Rep. 93-975

The Report also stated that one of th
changing the law was

> "(2) Growing difficulties facing exch
> in self regulatory actions as a re
> plaintiffs seeking damages against
> activities of the markets. As examp
> are sued for actions taken in emerg
> even when the action has been taker
> or order of the CEA." *Id.* at 48.

Similar language was used by Chairma
he discussed the bill on the House floor,
41333 (Dec. 13, 1973).[16] Although it ma

---

16 Chairman Poage also stated on the House fl
Commodity Exchange Act was enacted, courts

an awareness by key personnel in Co
court decisions implying a cause of ac
Act, it hardly constitutes approval of th
the first place, the Supreme Court
reminded us that "even the contempor
of a single legislator who sponsors
controlling in analyzing legislative hist
Product Safety Commission v. GTE
supra, 48 U.S.L.W. at 4662. Second
merely recognizes a "growing body of o
ing private rights of action. Had Congr
approve or encourage that fledgeling
could and would have indicated as muc
than extol the virtues of private right
Report and Chairman Poage emphasize
created by private rights and poin
private suits against exchanges for a
them pursuant to order or request of th
CFTC.

I find no logical basis for reading thi
language criticizing private rights of ac
sional *approval* of such suits, whic
majority attempts to do. The majori
Congress was not criticizing private r
but merely the problems they created
ing private suits to continue, it sou
exchanges from reducing their rules in
civil liability by empowering the CFT
exchanges to adopt appropriate rul
speculative extrapolation is not suppor

---

remedy for individual litigants in the Commo
119 Cong. Rec. 41333 (Dec. 13, 1973). He, of co
right of action was not implied by a lower co

in the legislative history of the a
is refuted by the plain language

A more sensible interpretatio
ments is that Congress sought
comprehensive, cohesive and
regulation, H.R. Rep. 93-975, *su*
95-850, *supra,* at 10, 13. Believi
of action were inconsistent w
sufficiently increased the power
it, rather than private individual
for monitoring the futures tradi

---

17 Chairman Poage himself retreated
rights of action. In December, 1973,
the House he claimed that the threat o
why the exchanges had cut back on t
however, when he presented the bill
House for approval he stated "Regula
working as well as it should, and *part*
of present law the exchanges may b
regulatory activities when they should
todays markets." 120 Cong. Rec. 107
Private rights of action hardly consti
law." Thus, on the day in which C
focused on the Commodity Exchange A
House passed the bill—not one word
rights of action. It strains credulity to
that Congress somehow *relied* on pri
enacted the 1974 amendments.

18 The majority also relies on the curso
of action raised by one or two repres
industry in the House hearings, se
Trading Act of 1974: Hearings Befo
Agriculture on H.R. 11955, 93d Con
majority reads far too much in the "fa
to these scattered, vague and unfocuse
Supreme Court in *Ernst & Ernst v. H*
n.24 (1975):

> "Remarks of this kind made in t
> or hearings other than by persons r
> or the drafting of a bill are entitl
> *United States v. United Mine Wo*

Intent in Enacting Reparations Procedure and Other Remedies

Both the 1974 Senate and tively outline the enforcement t Act as it then stood, togeth remedies recommended and fina 1131, 93d Cong., 2d Sess. 11-2 975, *supra*, 33-53. There is not that the panoply of enforcemen Congress, including reparation tended to supplement privat majority here urges. Indeed, linked the reparations procedu action or mentioned them in th of course it is not defendants Congress intended an express what little direct evidence there the reparations procedure sug informal arbitration procedure exclusive. The House Report, f the reparations procedure is

> "intended as a separate supplement the informal contemplated of contract intent of the Committee which can be resolved i without a formal proce

(1947); *United States v. Wrightu* 125 (1942). This is especially so w legislative opponents who "[i]n t understandably tend to overstat *Packers*, 377 U.S. 58, 66 (196 *Calvert Distillers Corp.*, 341 U.S.

proceeding] through
of the contract mark
to resolve that matte
22.

"A customer repara
Commission will be a
of enactment for h
which arise from viol
those which result i
the customer. The c
jurisdiction to consid
have not been res
settlement procedur
market and registere
the bill." *Id.* at 3.

"The provision for t
customers accounts s
equal justice for those
in some way damag
commodity accounts."
(Letter to the Com
Agriculture.)

Congress has also explicit
procedure was created to
bias favoring the resolutic
arbitration," H.R. Rep. N
91 (1978), thus casting fu
the procedure was inte
rights of action. Equally r
that where futures as
procedures, thus relievin
duty to adopt similar pro

. . . would have their c
their claims through
reparations proceedings,
proceeding," S. Rep. N
present purposes it is sig
not include a private ri

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19 The few comments relie
Congress' intent to approv
vague and abstruse to enti
the majority overstates
statement that the act "se
120 Cong. Rec. 10737 (A
Chairman Poage used t
enforcement provisions, i
suits and levy civil penalt
these provisions were "new
Poage did not mean that
"supplementary" to *implie*
meant that the remedies
already contained in the A
supplement implied privat
directly, not through an a

Similarly, the majority p
of Senator Talmadge on t
while discussing the exclu
House bill, discussed more

> "In establishing this C
> give it exclusive jurisdi
> act. This will assure
> traders, customers, et c
> agency rulings. Howeve
> exempt persons in the fu
> or regulations such as t
> Futures Trading Commi
> bodies such as those of t
> or the Securities and
> securities.
>
> "The vesting in the
> administrative law judge
> criminal penalties is lik
> courts in any way. It is
> authority will somewhat
> the entire appeal proces
> the courts are expressly

Moreover, in the
right to recover u

The majority als
second paragraph i
action. That sent
Congress to the ex
clause not to appr
that the exclusive
interfere with fe
antitrust suits and
agencies or with s
law claims. Senato
tional provision a
stated in pertinent

> "In addition, t
> the Act would
> conferred on co
> remedial legisl
> Congress found
> jurisdiction of
> Congress was
> various state a
> abuses. Accordi
> clear that all p
> tions, as well a
> any provision
> prevent the cre
> the time betwe
> implementation
> Trading Commi
> learned, for exa
> currently unde
> investigations
> therefrom will
> Cong. Rec. 349

Though the major
rights of action,
interpretation. No
private rights of
exclusively on the
existing court acti

Thus, the second
1974, statement i
jurisdiction to the
courts would be li

action against suc
express limitation
of civil penalties
contract market: (
amount which wi
market's ability t
§ 6b of Act, 7 U

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that Congress dic
burden of hearing
antitrust and reg
hearing contract

20 Moreover, whe
actions in the fed
those who violate
expressly exempt
liability, thus indi
the enforcement c
markets and floor
of private suits, i
that contract ma
concerned about c
well have been c
history clearly c
markets not becau
but because it des
those markets in
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Contrary to the
difference betwee
of damages in a p
may well have in
some guidelines fc
likelihood of incor
often happens in

The House Rep
continue to have
uniform body of
ity futures tradin
respect to § 6d "
with respect to t
Commission." *Id.*

"The Committe
States as a ne

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So c
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notifica
that § 6
CFTC
Senate
Federal
commo
for tyin
practice
(July 1
63), the

analyzed, overhauled and amended the enforcement provisions of the Act refutes the majority's claim that it somehow or other affirmatively intended such rights to continue as a supplement to the battery of enforcement weapons provided by it. Had it desired or intended this, the logical and natural procedure would have been for it to say so. *SEC v. Sloan*, 436 U.S. 103, 122 (1977). No court has ever imposed on Congress the contrary duty, which the majority urges, of expressly stating that the remedies provided by it are exclusive.

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order to assure national uniformity, Congress permitted only the CTFC or the States, under limited circumstances, to bring suit, not private individuals.

In light of Congress' cautious and careful approach to *parens patriae* suits under § 6d, including the insulation of contract markets from those suits, it would be anomalous for Congress to have approved private suits against contract markets and floor brokers. It is unlikely that Congress would have required States to notify CFTC of any action brought under § 6d while at the same time permitting private suits to blossom all over the country without the CFTC's knowledge. *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 419, 420-21 n.13 (1974) ("anomalous for Congress to have centralized SEC suits [against the SIPC] for the apparent convenience of the SIPC while exposing the corporation to substantively identical suits by investors 'in any court, State or Federal' ").

The majority's reliance on the statement of Senator Leahy to the effect that contract markets were exempted from § 6d, in part because of the deterrent effect of private suits, 124 Cong. Rec. S16527 (Sept. 28, 1978), is misplaced. Since Congress was well aware by 1978 that the lower courts had begun to deny private rights of action under the Act, 124 Cong. Rec. S10537 (July 12, 1978) (Statement of Senator Huddleston), Senator Leahy's statement must be characterized as a hope and a prayer. Moreover, the explanation rings hollow since it would apply equally well to those traders subject to *parens patriae* suits who, under the view adopted by Senator Leahy at least, were also subject to private causes of action. Had Congress in fact believed that traders and contract markets were subject to private rights of action, it would have been far less likely to enact a *parens patriae* provision subjecting traders to suit by the States. Nor would it have been as concerned as it was about exempting contract markets from those suits.

Jurisdictional Provisions

The majority next contends that the "savings clause" incorporated into the jurisdictional provision, § 2 of the Act, 7 U.S.C. § 2 (§ 201 in the enacted bill), explicitly preserves the private right of action implied by the lower courts. Section 201 originated in H.R. 13113 and as passed by the House it read:

> "Provided, That the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market; And provided further, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States."

During the Senate hearings Rep. Rodino, Chairman of the House Committee on the Judiciary, criticized the provision not on the grounds that it might eliminate private rights of action but rather because the provision might be interpreted as eliminating the jurisdiction of state courts over contract claims and the jurisdiction of federal courts over antitrust claims and suits seeking review of administrative hearings. His comments are

set forth in full in the margin.[21] He accordingly suggested the addition of a proviso to the effect that federal courts should not be ousted of their jurisdiction. As a result the following proviso was enacted:

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21 Chairman Rodino's statement reads in relevant part:

"This double proviso could be construed to raise a question of federal pre-emption of the commodity futures industry and, therefore, unnecessarily raises a question of federal-State relationships. Many of the millions of commodity futures contracts are presently enforceable in State courts under recognized commercial law and contract principles. This double proviso could, in effect, deprive State courts of their current jurisdiction. There does not appear to be any legislative intention or established need to achieve this pre-emption. . . .

"In addition, this double proviso could possibly be read as an attempt to oust even federal courts of jurisdiction. The first proviso confers 'exclusive jurisdiction' on the Commission for commodity transactions. Exceptions to this exclusive jurisdiction are carved out in the second proviso without, however, referring to federal district courts. That such a result was not intended in the House is readily apparent from the House action striking the original antitrust exempting provision: antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws. Arguably, too, if jurisdiction of federal courts were to be withdrawn also, the Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law.

"If it appears advisable to retain rather than to delete the double proviso of Section 201(B) of H.R. 13113, it would seem reasonable to amend the second proviso appropriately to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions. In this regard, the second proviso could be amended to provide:

"And provided further, that Nothing therein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities and on federal court. . . ." Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S 2578, S. 2837 and H.R. 13113, *supra*, at 259-60.

And provided further, That, except as herein
provided, nothing contained in this section sh
supersede or limit the jurisdiction at any
conferred on the Securities and Exchange Co
sion or other regulatory authorities under the
of the United States or of any State, or (ii) re
the Securities and Exchange Commission and
other authorities from carrying out their
and responsibilities in accordance with such
Nothing in this section shall supersede or lim
jurisdiction conferred on courts of the U
States or any State.

Other witnesses reiterated Chairman Rodino's
cisms without any reference to private rights of a
Mr. Keith Clearwater, Deputy Assistant Att
General, Dept. of Justice, for example, stated: "
are two problems with this language. It cou
interpreted to deprive the Federal Courts of
jurisdiction under the antitrust laws and to de
Federal and State courts of jurisdiction to en
contract and commercial law rights." Comm
Futures Commission Act: Hearings Before the S
Committee on Agriculture and Forestry on S.
S. 2578, S. 2837 and H.R. 13113, *supra,* at 663
Statements of James T. Halverson, Director of B
of Competition, Federal Trade Commission, *id.* at
68, and Statement of Glenn Willet Clark, Profes
Law, Drake University Law School, *id.* at 683-8

The majority's contention that the "savings cl
explicitly preserves a private right of action rests
on the comment of Senator Clark, while urgin
Senate to authorize private treble damage suits,
"Unfortunately, the House bill does not authorize

but section 201 of that bill may prohibit all actions. The staff has said that this was inadvertently and they hope it can be corrected Senate." *Id.* at 205.

This "passing reference" by a "single legislato slim reed on which to find congressional approv private right of action. *Consumer Product Commission v. GTE Sylvania, Inc., supra,* 48 U. at 4662; *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 31-32; *Chrysler Corp. v. Brown, supr* U.S. at 311; see *Ernst & Ernst v. Hochfelder,* 42 185, 204 n.24 (1976). Senator Clark's concern th House provision might prohibit "court actions" well have been intended to refer to actions arisi of commodity contract claims. Moreover, applyi principles of *Chrysler Corp.*, his statement m considered with the Reports of both Houses a statements of other witnesses and Congressmen which refute the majority's contention that the link between the jurisdictional provision of § 2(Congress' attitude toward private rights of acti

Given the reasons expressly advanced by Ch Rodino and given that no witness indicated th revision of § 201 was intended to preserve o affect any private rights of action in federal cou evidence is overwhelming that Congress simply t the task of correcting the problem noted by Ch Rodino and others and had no intention of appr private damage action. Had Congress inten preserve jurisdiction of the federal courts over suits it could easily have said so, as it did in § 6 it granted federal jurisdiction to hear CFTC-i injunctive suits, and in § 14(f) when it provid such jurisdiction to enforce judgments arising reparations proceedings.

The Act does not have any counte
jurisdictional provision of § 27 of th
Exchange Act of 1934, 15 U.S.C. §
affirmatively grants to federal courts exclu
tion of violations of the Act and of its re
authorizes civil suits to be brought in the
the defendant is found or resides. In a
"savings clause" here, which was directed
jurisdictional matters, could not pres
damage actions, since jurisdictional prov
create such rights, *Redington, supra,* 442
"The source of plaintiffs' rights must be fo
in the substantive provisions of the [Act
seek to enforce, not in the jurisdictional p
at 577 (citing cases).

The 1978 Amendments

Finally, although subsequent legislatio
limited weight in ascertaining Congres
enacting earlier laws, *Transamerica, supr*
at 248 n.13, the 1978 amendments are re
Congress did not provide expressly for a
of action against merchants and exchang
awareness that the lower courts had be
private rights of action under the Act,[22]

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22 The following cases, in addition to Judge MacM
this case, 470 F. Supp. 1256, have refused to imp
of action under the Commodity Exchange Act:
Witter & Co., 415 F. Supp. 535 (D. Neb. 1976
grounds, 571 F.2d 437 (8th Cir. 1978); *Consolo*
Weeks-Hemphill, Noyes, Inc., 436 F. Supp. 477
Bartels v. International Commodites Corp., 435
Conn. 1977); *Berman v. Bache Halsey Stuart, Shi*
Supp. 311 (S.D. Ohio 1979); *Alkan v. Rosenthal &*
Fut. L. Rep. Par. 20,797 (S.D. Ohio 1979); *Liang*
Supp. 891 (N.D. Ill. 1979); *Fischer v. Rosenthal &*
53 (N.D. Tex. 1979); *Stone v. Saxon and Windsor*
Comm. Fut. L. Rep. Par. 31,100 (N.D. Ill. 1980).

which Sen. Huddleston on the floor
deemed "unfortunate." 124 Cong. Rec. 1
1978). Instead, Congress proposed to
heavy burden on the reparations proced
the failure of lower courts to imply pri
action not by amending the Act to allow
as we would expect if it had approved o
but rather by eliminating the hearing r
reparations claims under $5,000. § 1
§ 18(b).

The failure of Congress to amend
particularly significant in light of its awa
time of the Supreme Court's recent but
adoption of somewhat stricter principles
implication of private causes of action.
414 U.S. 453 (1974); *Cort v. Ash*, 422 U
Securities Investor Protection Corp. v.
U.S. 412 (1975); *Blue Chip Stamps v.*
Stores, 421 U.S. 723 (1975); *Piper*
Industries, 430 U.S. 1 (1977); *Santa C*
Martinez, 436 U.S. 49 (1978).[23]

Second, Congress in 1978 received t
the states that they were uncertain, in l
adverse court decisions, about their al
parens patriae suits for violations of t
enforce their own contract and co
statutes. In sharp contrast to its 19
authorize private suits, Congress expres
the states to bring suits in federal co
violations of the Act or to obtain mon

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23 The majority responds that Congress' omissio
reasoning that Congress could not have been av
Supreme Court's retreat from a liberal view o
action). But, as the Court recognized in *Cannon*,
698, *Cort v. Ash* and other cases decided prior t
a stricter approach.

§ 6d, 7 U.S.C. § 13a-2, and exp
ability of the states to enforce
consumer fraud law. § 6d(5), 7 U.
apart from the fact that Congress'
contract markets and floor broker
§ 6d suggests a desire to insula
from private damage liability,[24] th
a clear indication that "Congress
private right of action when it
Transamerica, supra, 100 S. Ct. 2
Congress recognized that express
suits was necessary if a right unde
such litigation was to exist:

> "Section 12 specifically aut
> investigate or prosecute in a
> of the Act. . . . Any such ac
> in the proper Federal dist
> Commission is given the righ
> action as a party. *This is a n*
> *currently have no such expres*
> *Act."* H.R. Rep. No. 95-1181

This statement is strong evidence
intended to create a right of actio
so expressly, not by implication.[2

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24 See *supra* note 20.

25 Equally telling is the complete absenc
right of action in the exhaustive Se
Reports on the 1978 amendments, whic
private remedies available under the Ac
at 12-13; H.R. Rep. No. 95-1181, *supr*
Act, its history and its enforcement pro
private rights of action). This conspi
course, that Congress did not believe a
available.

The Theory that Congressional S
Amounts to Congressional Appro

Lacking any substantial suppo
legislative history of the Act t
atively approved private rights of
position boils down to the theor
have been aware generally of a fe
decisions implying a private righ
stood prior to 1974 and ther
approval of private rights unnece
mind that "[i]mplying a private c
basis of Congressional silence is a
at best," *Redington, supra,* 442
from congressional silence to c
must be made cautiously, if at
inappropriate to rely on the pre
the majority where, as here, Co
created a number of remedies whi
viewed as exclusive and where, if
adopt a prior judicial interpreta
additional remedy, it would have
body of earlier lower federal
provides a wholly inadequate bas
relevance, weight, period of existe
such an inference.

In *T.I.M.E. v. United States, su*
Court expressly rejected the posi
majority here. There a shipper of
it had a private cause of action un
Act to recover unreasonable rates
in violation of the Act. After rej
that the Act granted a private ri
because, as here, Congress specifi
a proposed cause of action, the Co

that the Act must be read
common-law or judicially

"The Government i
cases in addition to
years since passage o
which courts have a
issue of reasonablenes
was litigable, and in n
question given othe
attention. Under the
before us cannot fairl
long-standing interpre

"We are told that C
that the Commission
common-law action f
rates paid to a motor
Commission of the
would lie, and that
derogation of this vie
acceptance of it. But i
Commission's views ir
cated to committees
connection with a req
legislation which wou
cause of action under
the Commission the
tions, and each time th
[W]e do not think that
to grant a new author
permissibly be draw
authority previously
confirmed." 359 U.S.

The few decisions relie
consistent with the for
exceptionally long period
and not, as here, an inte
court, the Seventh Circui
old. In *Blue Chip Stamps*
421 U.S. at 733, the Co
acceptance by the lower
§10(b) limiting the caus
securities, coupled with th
that interpretation, despit
Commission's repeated ur
favor of acceptance" of th
supra, 441 U.S. 677, the
action under Title IX of t
1972, noted that Congres
under Title IX similar to
and found that Congress
had implied a right of ac
VI. The Court, however, s
on the presumption used
private right of action mu
expressly repealed by Co
decision on what it
affirmative intent to creat
at 699.

Similarly in *SEC v. Slo*
Court rejected the argum
presumed to have approve
tive construction of a s
enactment of the statute
interpretation and the fac
the relevant Senate C
understood and approved

noted that "we a
general congressio
construction based
in the thousands
That language i
additional indicatio
awareness, is sim
presumption in a
Court concluded th
the prior interpret
said so. This princ
present case.

The cases cited
contrary. In *Lorilla*
Court found that
Discrimination Em
porating a number
Standards Act (FL
construction of tho
because Congress e
FLSA provisions
willingness to depa
which it disagreed,
the changes made
intended to incorp
interpretations of
from the situatio
references to the p
and far between i
Congress dos not
interpretation.

Reliance on *Geor*
(1978), is similar
congressional acqui

decision to be pe
decision was rep
Congress. Indeed,
approximately 73
in the Senate, *id.*

All of these a
inference as to co
to draw in this c
placed on a few s
references in thou
rather than upon
identified Suprem
Georgia. Unlike th
§ 10(b), with whi
Superintendent of
find a brief line of
are relevant to th
only one year bef
knowledge of whi
This hardly con
recognized prior
invoke the dubi
majority here. The
amended the Sec

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26 The other cas
distinguishable. I
rights of action a
to go slow in in
approve a private
Second, the case
interpretation is
year old history o
115 F.2d 709 (2d
Electric Storage
where, unlike the
references in the
Bennett v. Panan

opinion, *su*
decisions (e
Chip Stamp
quite differ
court decisi
had knowle
of action ba
are invoked
Lastly, si
1974 decisi
theory of t
unreasonabl
Supreme Co
by tacitly g
Co. v. Unite
v. Sloan, s
interpretati
statutory a
when thoro
Supreme C
signaled a s
tion of priv
notice that t
private righ
settled.
In the la
speculation
reasonable
issue was sq
failed to ap
indicate in a
implied one.
its refusal
rights of ac

(Powell, J., dissenting). Under these circumstances, absent some expression of approval by Congress, formal or informal, I believe we should not imply an intent on its part to create an implied right of action. Under these circumstances, creation of a private right rests with Congress, not the judiciary.

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 2375 (LFM), 76 Civ. 2554 (LFM),
76 Civ. 2571 (LFM), 76 Civ. 2594 (LFM)

NATIONAL SUPER SPUDS, INC. et al.,

Plaintiffs,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

---

76 Civ. 2648 (LFM)

INCOMCO,

Plaintiff,

—against

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

---

76 Civ. 3210 (LFM)

HOWARD BERENSON,

Plaintiff,

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

---

76 Civ. 4350 (LFM)

NEIL LEIST et al.,

Plaintiffs,

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

---

76 Civ. 5200 (LFM)

DEXTER RICHARDS,

Plaintiff,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

APPEARANCES:

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—and—

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MacMahon, *District Judge.*

Defendants, the New York Mercantile Exchang
"Exchange"), Richard Levine ("Levine"), Howard
("Gabler"), Alfred Pennisi ("Pennisi"), Clayton F
age Co. of St. Louis, Inc. ("Clayton"), Heinold Cor
ties, Inc. ("Heinold") and Thomson & McKinnon A
closs Kohlmeyer, Inc. ("Thomson"), move under
12(c), Fed.R.Civ.P., for judgment on the pleadin
in the alternative, under Rule 56(b), Fed.R.Civ.
partial summary judgment dismissing all or part
complaints against them in these related actions.[1]

[1] The Exchange moves in the following actions: *Nationa
Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2
Civ. 2554, 76 Civ. 2571, 76 Civ. 2594 (the "consolidated c

all parties have submitted factual materia
pleadings, we treat the motions as motion
summary judgment.

These actions arise out of the much publ
in May 1976 of Maine potato futures contra
sellers of almost 1,000 contracts failed to de
imately 50,000,000 pounds of potatoes, res
largest default in the history of commodities
ing in this country. The primary claim in th
that the default was caused by certain defe
manipulation.

In order to understand these motions, a
standing of the commodities futures industr
A commodity future is a contract for the fu
of a certain commodity. Except for price, all
the contracts for a given commodity traded o
are standardized and, thus, the contracts are
actual trading of futures is done by future
merchants and floor brokers, both of whom
istered with the Commodities Futures Tradin

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tions"); *Incomco* v. *New York Mercantile Exchang*
and *Leist* v. *Simplot*, 76 Civ. 4350.

Levine, Gabler and Pennisi move in *Leist* v. *S*
4350.

Clayton moves in the consolidated class actions
Simplot, 76 Civ. 4350.

Heinold and Thomson move in the consolidated
Berenson v. *Simplot*, 76 Civ. 3210, and in *Leist* v.
4350.

The motions of the Exchange, Levine, Clayto
Thomson in *Richards* v. *New York Mercantile Ex*
5200, are denied as moot because this action was di
these motions were filed.

The motions of the Exchange and Clayton in *B*
plot, 76 Civ. 3210, are also denied as moot because
been discontinued as to the Exchange and Clayton.

[3] See N.Y. Times, May 26, 1976, at 1, col. 1.

(the "CFTC").[3] Additionally, trading may
on exchanges which have complied with ce
requirements and have been designed as
kets" by the CFTC.[4]

A seller of a futures contract is, in the l
trade, in a "short" position, that is, he is o
liver the commodity at a future date in
right to receive the purchase price. Convers
a futures contract is said to be in a "long"
is, he is obligated to pay the purchase pric
the right to receive the commodity. As a pr
however, physical delivery of the commodi
only a small fraction of the futures contr
the nation's exchanges. Most of the trade
speculators who have no intention of delive
ing the actual commodity. As the last day
particular contract approaches, a speculator
sition (a seller) will cover his obligation
buying a contract. Similarly, a speculator
tion (a buyer) will cover his obligation to p
contract.[5]

Plaintiffs, traders and a dealer in potato
holding long positions in May 1976 Maine
contracts. They allege that Clayton, Heinold
futures commission merchants, conspired v
their customers to manipulate and depress t
May contract by selling an illegally large n
contracts, thereby causing plaintiffs to sell
and potatoes at an artificially depressed p

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[3] 7 U.S.C. §§ 6d, 6e, 6f.

[4] 7 U.S.C. §§ 6, 7.

[5] The commodities futures industry is describe
in S. Angrist, Sensible Speculating in Commod
S. Kroll & I. Shishko, Commodity Futures Mark

Plaintiffs contend that the action
and Thomson violated the Commo
(the "Act"), various regulations pro
and Sections 1 and 2 of the Sherma
contend that the Exchange, a design
and its officers, Levine, Gabler and
them for failure to take steps to p
price manipulation by the other def
Exchange conspired with the other d
late the price.

Specifically, plaintiffs allege that
officers failed to report and concealed
and the regulations promulgated the
change and its officers violated the Ac
its own rules, the Act and the CFT
that the Exchange violated Sections 1
Act.

IMPLIED RIGHT OF A

All moving defendants contend tha
partial summary judgment because
right of action against them under
such a right of action existed prior

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[6] 7 U.S.C. § 1 et seq.

[7] Plaintiffs also allege violations of th
cause the obligation to obey these rules
regulations, we consider these claims as
CFTC's regulations.

[8] 15 U.S.C. §§ 1, 2.

[9] *E.g., Deaktor* v. *L.D. Schreiber & Co.*,
rev'd on other grounds sub nom. Chicago
Deaktor, 414 U.S. 113 (1973); *Goodman*
F. Supp. 440 (N.D. Ill. 1967).

year, the Act was amended exten
tion before us is whether the priv
survived the 1974 amendments to th

Although a number of other di
sidered this question, there is no
answer.[11] This difference of opini
of the question to the future course
us to resolve the question ourselves

Under *Cort* v. *Ash*,[12] four factors
mining whether a private right of
under a federal statute which does
for one:

> "First, is the plaintiff 'one o
> *especial* benefit the statute wa

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[10] Commodity Futures Trading Comm
L. No. 93-463, 88 Stat. 1389 (codified at
Act was further amended in 1978. Fut
Pub. L. No. 95-405, 92 Stat. 865 (codifie

[11] Nine cases have stated that a priv
under the Act: *R.J. Hereley & Son* v.
L. Rep. (CCH) ¶ 20,773 (N.D. Ill. 1979)
C 2297 (N.D. Ill. Feb. 2, 1979); *Grav*
& Smith, Inc., Comm. Fut. L. Rep. (
1978); *Berenson* v. *Madda Trading Co.*
30, 1978); *Hoffmayer* v. *Dean Witter &*
(CCH) ¶ 20,694 (N.D. Cal. 1978); *Kel*
346 (W.D. Mich. 1977); *Bache Halsey*
F. Supp. 1231 (D.D.C. 1977); *Shears*
Lumber Merchants, Inc., 423 F. Supp
Milani v. *Conticommodity Serv., Inc.*, 46
1976).

Five cases have stated that no priv
under the Act: *Alkan* v. *Rosenthal &*
(CCH) ¶ 20,797 (S.D. Ohio 1979); *Ber*
art, Shields, Inc., Comm. Fut. L. Rep. (
1979); *Bartels* v. *International Commo*
865 (D. Conn. 1977); *Consolo* v. *Horn*
Noyes, Inc., 436 F. Supp. 447 (D. Ohi
Witter & Co., 415 F. Supp. 535 (D.
grounds, 571 F.2d 437 (8th Cir. 1978).

[12] 422 U.S. 66 (1975).

> does the statute create a
> plaintiff? Second, is th
> tive intent, explicit or i
> a remedy or to deny on
> with the underlying pur
> to imply such a remedy
> finally, is the cause of act
> to state law, in an area
> States, so that it would
> cause of action based so

There can be no question t
commodities market and a
the class "for whose especi
acted." As Senator Dole st
the 1974 amendments to the
manipulation of markets and
desires to participate in futu
tionally, the Act itself state
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Thus, we find that the fir
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The second element of the
is more troublesome. The
established an administrat
"[a]ny person complaining
vision of this chapter or a
thereunder by any person w

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[13] *Id.* at 78 (citations omitted

[14] 120 Cong. Rec.-Senate 3046
accord 120 Cong. Rec.-Senate
Clark). See also *Ames* v. *Merri*
Inc., 567 F.2d 1174, 1179 (2d C

[15] 7 U.S.C. § 5.

be registered under . . . t
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reparations. Judgments re
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The 1974 amendments also
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The CFTC may suspend o
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the Attorney General, at t
thorized to bring an actio
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a restraining order, an inj
to compel compliance wit
thereunder.[22]

We believe that under t
est exclusio alterius," [23] the

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[16] 7 U.S.C. § 18(a).

[17] 7 U.S.C. § 18(g).

[18] 7 U.S.C. § 18(f).

[19] 7 U.S.C. §§ 7b, 9.

[20] 7 U.S.C. § 13a.

[21] 7 U.S.C. §§ 9, 13a.

[22] 7 U.S.C. § 13a-1. The 197
provision by which a state ma
behalf of its citizens. 7 U.S.C.

[23] Expression of one thing
Securities Investor Protection
(1975); *National R.R. Passen*
Passengers, 414 U.S. 453, 458
& Co., 592 F.2d 617, 629-30 (
cert. granted, 47 U.S.L.W. 336

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[24] Hearings on S. 24
the Senate Committee
Sess. pt. 3, 737, 746 (19

[25] S. 2837, 93d Cong
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[26] *Piper* v. *Chris-Cr*
Cort v. *Ash*, *supra*, 4
U.S. 426, 432 (1964);
tion from Federal Stat
53, 69 (1975).

[27] 7 U.S.C. § 13a.

the CFTC is requir
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Additionally, the
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Thus, we conclud
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Thus, our applic
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[28] *Id.*

[29] See text accompa

[30] See *e.g. Smith* v.
Fairchild, Arabatzis
(CCH) ¶ 20,706 at 22

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[33] 15 U.S.C.

[33] The SEC
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[34] 15 U.S.C.

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critical importance when it implied private rights of action under that Act.[35]

Plaintiffs also argue that the CFTC interprets the Act as allowing private rights of action[36] and that the CFTC's interpretation is entitled to "'great deference.'"[37] However, as the Supreme Court has recently stated, the administrative deference rule is not applicable where the "narrow legal issue is one particularly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants."[38]

Finally, we note that the Supreme Court's recent decision in *Cannon* v. *University of Chicago*[39] is readily distinguishable from this case. In *Cannon*, the Supreme Court implied a private right of action for a victim of alleged sex discrimination under Title IX of the Education Amendments of 1972,[40] despite the existence of an administrative procedure to enforce those amendments. However, the only administrative remedy under Title IX is the termination of federal grants to educational institutions which discriminate on the basis of sex. Thus, the Supreme Court found that Title IX provided no private administrative remedy to victims of sex discrimination.[41] In contrast,

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[35] *Securities Investor Protection Corp.* v. *Barbour*, *supra*, 421 U.S. at 424; *J.I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 430-31.

[36] Amicus Curiae Brief of the Commodities Futures Trading Commission submitted in *Smith* v. *Grover*, *supra*.

[37] *United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977) (citations omitted).

[38] *Piper* v. *Chris-Craft Indus., Inc.*, *supra*, 430 U.S. at 41 n.27.

[39] 47 U.S.L.W. 4549 (U.S. May 14, 1979) (No. 77-926).

[40] 20 U.S.C. §§ 1681-1686.

[41] See 47 U.S.L.W. at 4556.

the reparations procedure available under the Commodities Exchange Act provides a remedy directly for the benefit of private parties injured by violations. Thus, unlike *Cannon,* the implication of a right of action here is not necessary to provide a plenary remedy to the intended beneficiaries of the Act.

Cannon is also distinguishable for a second reason. In *Cannon,* the Supreme Court noted that Title IX was enacted in 1972 when the Court had been rather liberal in finding implied rights of action. The Court found that Congress expected Title IX to be interpreted in accordance with that liberal view.[42] The Commodities Exchange Act, on the other hand, was reconsidered by Congress as recently as last year when the Supreme Court had retreated from its liberal view toward implied rights of action.[43] Yet, in enacting the 1978 amendments to the Act, Congress again failed to add a section expressly providing for a private right of action despite knowledge that a number of district courts had held that the private right of action previously implied did not survive the 1974 amendments.[44] *Cannon* teaches that the failure of Congress to provide for a private right of action must be viewed in light of the judicial attitude toward such rights at the time of enactment. In light of that teaching, the failure of Congress to provide for a private right of action in the 1978 amendments evidences an intent to deny such a right.

Thus, we conclude that there is no private right of action against futures commission merchants and contract markets under the Act. Since there is no private right of action under the Act, it necessarily follows that there is no private

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[42] *Id.* at 4554.

[43] *Id.*

[44] 124 Cong. Rec.-Senate 10537 (remarks of Sen. Huddleston).

right of action under the regulations promulgated pursuant to the Act.[45]

ANTITRUST CLAIMS

Clayton and Heinold also move for summary judgment on the antitrust claims, asserting that there is no genuine issue of fact that they did not intend to manipulate the price of May 1976 Maine potato futures contracts.

A party seeking summary judgment bears the burden of demonstrating the absence of any genuine issue of fact,[46] even when the motion is unopposed.[47] Clayton and Heinold have submitted excerpts of deposition testimony given by certain of their employees. Although this testimony does tend to show that Clayton and Heinold lacked the intent required for a violation of the Sherman Act, it is neither conclusive nor sufficiently clear to allow us to conclude that there is no genuine issue of fact. Clayton's employee, Delbridge, admitted that Clayton took no steps to investigate its clients' ability to deliver despite their large short position, and Heinold's vice-president, Klopfenstein, admitted that Heinold did not take the steps that it normally would have taken to ensure that its short customers could deliver. Given the elusive nature of intent and its significance to an antitrust violation,[48] we cannot say that there is no issue of fact regarding Clayton's and Heinold's knowledge and intent.[49]

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[45] *Crane Co.* v. *American Standard, Inc.*, No. 77-7517, slip op. at 2019 n.11 (2d Cir. Apr. 4, 1979).

[46] *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

[47] *Id.* at 160.

[48] See *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978).

[49] See *SEC* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978) ("[S]ummary judgment is likely to be inappropriate when the issues concern intent.").

Accordingly:

1. There being no just reason for delay, the Clerk court is directed, pursuant to Rule 54(b), Fed.R.Civ. enter final judgment:

A. In favor of the Exchange on its motion partial summary judgment on the sixth claim first amended consolidated class action compla *National Super Spuds, Inc.* v. *New York Merc Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 257 76 Civ. 2594; the first and fourth claims of the plaint in *Incomco* v. *New York Mercantile Exchan* Civ. 2648; and the fourth claim of the compla *Leist* v. *Simplot*, 76 Civ. 4350;

B. In favor of Levine, Gabler and Pennisi on motion for summary judgment on the fourth cla the complaint in *Leist* v. *Simplot*, 76 Civ. 4350;

C. In favor of Clayton on its motions for p summary judgment on the fourth claim of th amended consolidated class action complaint i *tional Super Spuds, Inc.* v. *New York Mercanti change*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 a Civ. 2594; and the first claim of the complaint in v. *Simplot*, 76 Civ. 4350;

D. In favor of Heinold and Thomson on thei tions for partial summary judgment on the claim of the first amended consolidated class complaint in *National Super Spuds, Inc.* v. *New Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 7 2571 and 76 Civ. 2594; the first claim of the com in *Leist* v. *Simplot*, 76 Civ. 4350; and the second of the complaint in *Berenson* v. *Simplot*, 76 Civ. to the extent that it asserts a claim under the Act

2. Clayton's and Heinold's motions for summar
ment in their favor on all other claims against t
denied in all respects.

So ordered.

Dated: New York, N.Y.
May 29, 1979

/s/ Lloyd F. MacM
Lloyd F. MacM
United States Distric

Judgment of the Court of Appe

UNITED STATES COURT OF API

For the Second Circuit

At a stated Term of the United States Cou
for the Second Circuit, held at the United
house in the City of New York, on the eighth
one thousand nine hundred and eighty.

79-7402, 79-7464, 79-7482

Neil Leist, Philip Smith and Inc

Plaintif

—v.—

John Richard Simplot, J.R. Simplot &

Clayton Brokerage Co. of St. Loui
Heinold Commodities Inc., *et a*

Defenda

Present:

Hon. Henry J. Friendly,
Hon. Walter R. Mansfield,
Hon. Amalya L. Kearse,

C

Appeal from the United States District
Southern District of New York.

This cause came on to be heard on the
record from the United States District
Southern District of New York, and was arg

On Consideration Whereof, it is now h
adjudged, and decreed that the order of said
be and it hereby is reversed in accordance w
of this court with costs to be taxed against th

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By: /s/ A
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ORDER DENYING RE

UNITED STATES COURT

SECOND CIRCUI

At a Stated Term of the United States
for the Second Circuit, held at the Unite
the City of New York, on the ninth day
sand nine hundred and eighty.

PRESENT:

HON. HENRY J. FRIEN
HON. WALTER R. MAN
HON. AMALYA L. KEA

79-7402

NEIL LEIST, PHILIP SMITH a

—against—

JOHN RICHARD SIMPLO

CLAYTON BROKERAGE CO. OF ST. LOU
MODITIES, INC., THOMSON & MC
KOHLMEYER, INC., NEW YORK M
RICHARD B. LEVINE, HOWARD GA

79-7464

INCOMCO,

—against—

THE NEW YORK MERCANTILE EXCH
PRODUCE CO., & HAROI

THE NEW YORK MERCANTI

79-7482

NATIONAL SUPER SPUDS, INC., WILLI
LARD C. SHINER, EUGENE P. WE
RAYMOND ROTHBERG, ARTHUR S.
BRINEK, CAPGAIN HOLDINGS, INC
individually and on behalf of all p

—against—

NEW YORK MERCANTILE E

HEINOLD COMMODITIES, INC., and T
AUCHINCLOSS, KOHLME

A petition for a rehearing having be
for the defendant-appellee Heinold Co
Upon consideration thereof, it is
Ordered that said petition be and he

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ORDER DENYING R

UNITED STATES C

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At a Stated Term of the Unit
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CLAYTON BROKERAGE CO. OF
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KOHLMEYER, INC., NEW
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NEW YORK MERCA

HEINOLD COMMODITIES, INC
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A petition for rehearing cont
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Upon consideration thereof,
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SEC. 1. All legislati
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Provisions

Section 4a, 49 Stat

SEC. 4a. (1) Exces
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Section 4a

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were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or different trading limits for buying and selling operations, or different limits for the purposes of paragraphs (2)(A) and (B) of this section, or from exempting transactions normally known to the trade as "spreads" or "straddles" or "arbitrage" or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word "arbitrage" in domestic markets shall be defined to mean the same as a "spread" or "straddle". The Commission is authorized to define the term "international arbitrage".

(2) The commission shall, in such order, fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person—

(A) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the commission in such order for or with respect to such commodity; or

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity: *Provided,* That such position limit shall not apply to a position acquired in good faith prior to the effective date of such order.

(3) No order issued under paragraph (1) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions as such terms shall be defined by the Commission within one hundred and eighty days after the

effective date of the Commodity Futures Trading Commission Act of 1974 by order consistent with the purposes of this chapter.

(4) This section shall apply to a person that is registered as a futures commission merchant or as floor broker under authority of this chapter only to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. This section shall not apply to transactions made by, or on behalf of, or at the direction of, the United States, or a duly authorized agency thereof.

Section 4b, 49 Stat. 1493-94 (1936)

SEC. 4b. It shall be unlawful for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of (1) any contract of sale of any commodity in interstate commerce, or (2) any contract of sale of any commodity for future delivery made, or to be made, on or subject to the rules of any contract market for or on behalf of any person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such person;

(B) willfully to make or cause to be made to such person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

Section 4b, 7 U.S.C. § 6b

§ 6b. Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such com-

modity or the products or by-products thereof, or (b) deterr
the price basis of any transaction in interstate commerce i
commodity, or (c) delivering any such commodity sold, sh
or received in interstate commerce for the fulfillment the

(A) to cheat or defraud or attempt to cheat or d
such other person;

(B) willfully to make or cause to be made to such
person any false report or statement thereof, or willf
enter or cause to be entered for such person any false
thereof;

(C) willfully to deceive or attempt to deceive such
person by any means whatsoever in regard to any such
or contract or the disposition or execution of any such
or contract, or in regard to any act of agency performe
respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by
against the order or orders of any other person, or wi
and knowingly and without the prior consent of such p
to become the buyer in respect to any selling order o
person, or become the seller in respect to any buying or
such person.

Nothing in this section or in any other section of this ch
shall be construed to prevent a futures commission mercha
floor broker who shall have in hand, simultaneously, buyin
selling orders at the market for different principals for
quantity of a commodity for future delivery in the same m
from executing such buying and selling orders at the m
price: *Provided,* That any such execution shall take place
floor of the exchange where such orders are to be executed a
lic outcry across the ring and shall be duly reported, recorde
cleared in the same manner as other orders executed on su
change: *And provided further,* That such transactions sh
made in accordance with such rules and regulations as the
mission may promulgate regarding the manner of the exe
of such transactions.

Section 5a(11), 7 U.S.C. § 7a(11)

§ 7a. Duties of contract markets

Each contract market shall—

Settlement of customers' claims and grievances

(11) provide a fair and equitable procedure through a
tion or otherwise (such as by delegation to a registered
association having rules providing for such procedures)
settlement of customers' claims and grievances agair
member or employee thereof: *Provided,* That (i) the use
procedure by a customer shall be voluntary, (ii) the pr
shall not be applicable to any claim in excess of $15,000,
procedure shall not result in any compulsory payment ex
agreed upon between the parties, and (iv) the term "custo
used in this paragraph shall not include a futures com
merchant or a floor broker,

Section 6(b), 7 U.S.C. § 9

**§ 9. Exclusion of persons from privilege of "contract m
procedure for exclusion; penalties; review by c
appeals**

If the Commission has reason to believe that any perso
than a contract market) is manipulating or attempting to
ulate or has manipulated or attempted to manipulate the
price of any commodity, in interstate commerce, or fo
delivery on or subject to the rules of any contract market
willfully made any false or misleading statement of a
fact in any registration application or any report filed
Commission under this chapter, or willfully omitted to
any such application or report any material fact which is
to be stated therein, or otherwise is violating or has violate
the provisions of this chapter or of the rules, regulations, c
of the Commission thereunder, it may serve upon such
complaint stating its charges in that respect, which co
shall have attached or shall contain therein a notice of

specifying a day and place not less than three da
vice thereof, requiring such person to show cau
should not be made prohibiting it from trading
the rules of any contract market, and directing
markets refuse all trading privileges to such pers
notice of the Commission, and to show cause why
of such person, if registered as futures commiss
any person associated therewith as described in s
title, commodity trading advisor, commodity poo
floor broker hereunder, should not be suspended
hearing may be held in Washington, District of C
where, before the Commission, or before an Adm
Judge designated by the Commission, which Adm
Judge shall cause all evidence to be reduced to w
with transmit the same to the Commission. Up
ceived, the Commission may prohibit such person
or subject to the rules of any contract market and
tract markets to refuse such person all trading p
for such period as may be specified in the order, an
is registered as futures commission merchant or
ciated therewith as described in section 6k of this
trading advisor, commodity pool operator, or as fl
under, may suspend, for a period not to exceed si
voke, the registration of such person, and may as
a civil penalty of not more than $100,000 for eac
Notice of such order shall be sent forthwith by re
by certified mail or delivered to the offending pe
governing boards of said contract markets. After
the order by the Commission, the person against
may obtain a review of such order or such other e
to the court may seem just by filing in the United
appeals of the circuit in which the petitioner is
written petition, within fifteen days after the noti
is given to the offending person praying that the o
mission be set aside. A copy of such petition sh

transmitted by the clerk of the court to the Comr
upon the Commission shall file in the court the r
made, as provided in section 2112 of Title 28. U
the petition the court shall have jurisdiction to a
or modify the order of the Commission, and th
Commission as to the facts, if supported by t
dence, shall in like manner be conclusive.

Section 8(a), 7 U.S.C. § 12(a)

§ 12(a). Investigations respecting operations o and others subject to this chapter; sults; restrictions

(a) For the efficient execution of the provisio
and in order to provide information for the use
Commission may make such investigations as it
to ascertain the facts regarding the operations
and other persons subject to the provisions of
Commission may publish from time to time t
such investigation and such general statistical i
ered therefrom as it deems of interest to the
That except as otherwise specifically authorize
the Commission may not publish data and infor
separately disclose the business transactions or
of any person and trade secrets or names of cu

Section 8c, 7 U.S.C. § 12c

§ 12c. Disciplinary actions; notice; revie Commission

(1)(A) Any exchange or the Commission if
to act, may suspend, expel, or otherwise discipli
is a member of that exchange, or deny any perso
change. Any such action shall be taken solely i
the rules of that exchange.

(B) Any suspension, expulsion, discip
procedure established by an exchange rul
ten notice to the Commission and to the p
expelled, or disciplined, or denied access, v
includes the reasons for the exchange acti
ner the Commission prescribes. An exch
its findings and the reasons for the exch
proceeding, including the action taken
but shall not disclose the evidence theref
who is suspended, expelled, or disciplined,
the Commission.

(2) The Commission may, in its discr
with such standards and procedures as
review any decision by an exchange wher
ed, expelled, otherwise disciplined, or d
change. In addition, the Commission ma
upon application of any person who is ac
other exchange action, review such actio

(3) The Commission may affirm, mod
any exchange decision it reviews pursuant
section, after a determination on the reco
the exchange was in accordance with the
Subject to judicial review, any order of t
pursuant to paragraph (2) of this secti
change in its further treatment of the ma

(4) The Commission, in its discretion,
action taken pursuant to paragraph (1)
review thereof.

Section 9, 42 Stat. 1003 (1922)

SEC. 9. Any person who shall violate th
of this Act, or who shall fail to evidence
in said section by a record in writing as t

shall knowingly or carelessly deliver fo
mails or in interstate commerce by tele
or other means of communication fals
ingly inaccurate reports concerning cr
or conditions that affect or tend to affe
terstate commerce, shall be deemed gui
upon conviction thereof, be fined not mo
oned for not more than one year, or bo
of prosecution.

Section 9, 49 Stat. 1501 (1936)

SEC. 9. Any person who shall violat
4, section 4a, section 4b, section 4c, sec
4h, or section 4i of this Act, or who shal
manipulate the price of any commodit
or for future delivery on or subject to
trade, or who shall corner or attempt
modity, or who shall fail to evidence a
section 4 of this Act by a record in writ
who shall knowingly or carelessly deliv
for transmission through the mails or i
telegraph, telephone, wireless, or other
false or misleading or knowingly inac
crop or market information or conditi
affect the price of grain in interstate co
guilty of a misdemeanor, and, upon co
not more than $10,000 or imprisonme
year, or both, together with the costs o

Section 9, 82 Stat. 33–34 (1968)

SEC. 9. (a) It shall be a felony punis
than $10,000 or imprisonment for not
both, together with the costs of prosecu
mission merchant, or any employee or a
steal, purloin, or with criminal intent co

use of another, any money, sec
in excess of $100, which was r
chant to margin, guarantee, or
any customer of such commiss
customer as the result of suc
'value' as used in this paragraph
or cost price, either wholesale

(b) It shall be a felony puni
$10,000 or imprisonment for n
together with the costs of pros
ulate or attempt to manipulate
terstate commerce, or for future
of any contract market, or to co
commodity, or knowingly to de
transmission through the mails
graph, telephone, wireless, or
false or misleading or knowing
crop or market information or
affect the price of any commod

(c) Except as provided in pa
tion, it shall be a misdemeanor
than $10,000 or imprisonment
both, together with the costs
violate the provisions of section
4c, section 4d, section 4e, sectio
fail to evidence any contract me
a record in writing as therein r

Section 9(b), 7 U.S.C. § 13(b

**§ 13(b). Price manipulation; c
semination of false
ing price of commo**

(b) It shall be a felony puni
$500,000 or imprisonment for

together with the costs of pros
ulate or attempt to manipulate
terstate commerce, or for futur
of any contract market, or to
such commodity, or knowingly
for transmission through the n
telegraph, telephone, wireless,
false or misleading or knowin
crop or market information o
affect the price of any comm
knowingly to violate the provisi
6c(e), 6h, 6o(1), or 23 of this ti
or misleading statement of a m
plication or report filed with
omit in any application or
required to be stated therein.
the case of any violation descri
person who is an individual,
$100,000, together with the co

Section 9(c), 7 U.S.C. §13(c

§ 13(c). Other violations; mis

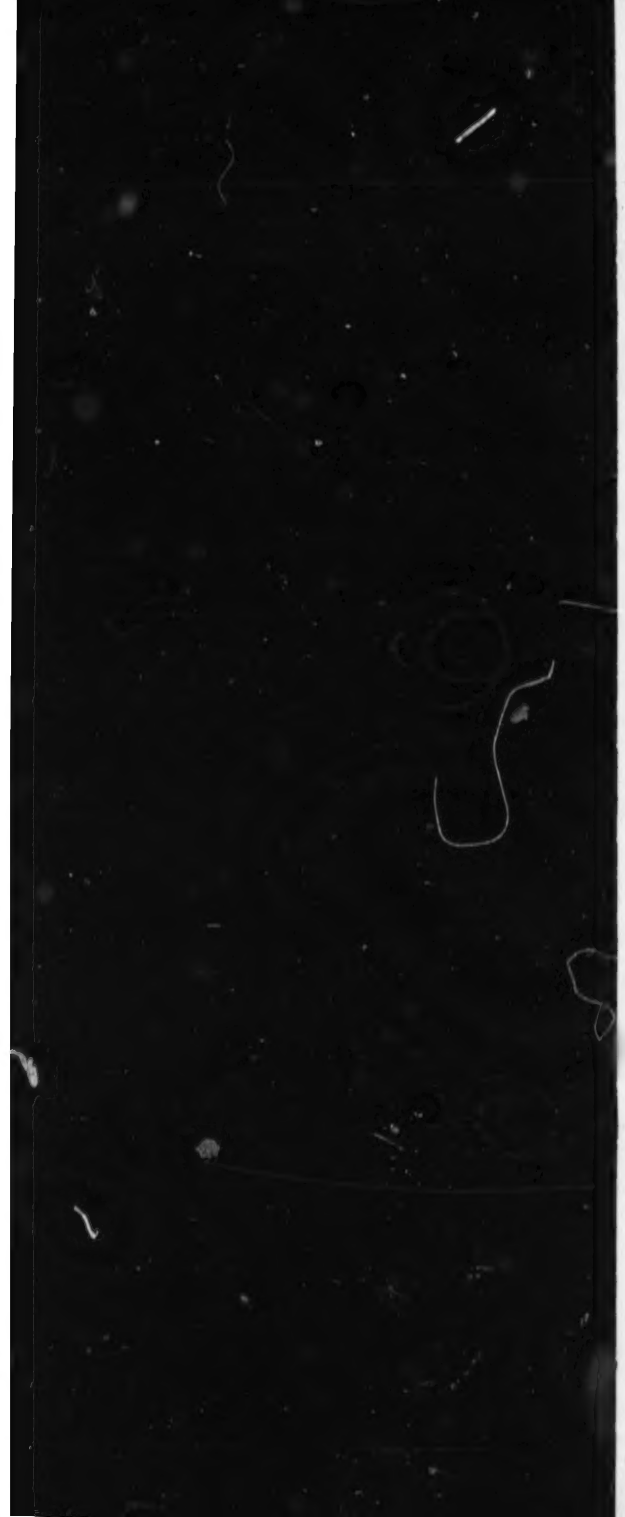
(c) Except as provided in su
this section, it shall be a misde
more than $100,000 or imprisc
or both, together with the cost
violate any provisions of sect
6o(2), or 12b of this title, or to
tioned in section 6 of this titl
required.

Section 6c, 7 U.S.C. § 13a-

§ 13a-1. Action to enjoin
writs and orders;

Whenever it shall appear to
market or other person has eng

gage in any act or pra
sion of this chapter or a
is restraining trading i
Commission may brin
the United States or th
tory or other place subj
to enjoin such act or p
chapter, or any rule,
courts shall have jurisd
That no restraining or
sions of this chapter sh
proper showing, a perm
ing order shall be gran
Commission, the distri
ed States courts of any
diction of the United S
writs of mandamus, or
any person to comply
rule, regulation, or ord
ing the requirement th
sary to remove the dan
rule, regulation, or ord
damus, or order affordi
action under this secti
the defendant is found
in the district where th
is about to occur, and
district in which the d
defendant may be fou
suant to this section, t
General to bring the
bring the action, it shal
and advise him of subs



§ 13a-2. Jurisdictio

(1) Whenever it s
State, the administr
such other official as
the residents of that
ened or adversely aff
tract market, clearin
engaging or is about
a violation of any pro
or order of the Comm
in equity or an actio
such act or practice,
any rule, regulation,
obtain damages on
further and other rel

(2) The district c
courts of any territ
States for the Distri
suits in equity and ac
force any liability o
regulation, or order
damages or other rel
cation, such courts sh
damus, or orders affo
to comply with the p
tion, or order of the C
ment that the defend
the danger of violati
tion, or order. Upon
injunction or restrai

(3) Immediately
State shall serve writ

provide the
Commission
action and, u
therein, and

(4) Any s
court of the U
the defendan
wherein the
occur, and pr
which the de
may be found

(5) For pu
tion, nothing
the administr
thorized Stat
them by the l
minister oath
nesses or the

(6) For pu
the United S
of Puerto Ric

(7) Nothi
rized State o
an alleged vi
ute of such S

Section 6(

§ 15. Enfor

For the pu
sions of this
proceeding u
any Adminis

Commission may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry. The attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing. In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found.

Section 14, 7 U.S.C. § 18

§ 18. Complaints against registered persons

Petition

(a) Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded

by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

Investigation and hearing

(b) If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business: *Provided,* That in complaints wherein the amount claimed as damages does not exceed the sum of $5,000, a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact.

Determination

(c) After opportunity for hearing on complaints where the damages claimed exceed the sum of $5,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of $5,000 not requiring hearing as provided herein, the Commission shall determine whether or not the respondent has violated any provision of this chapter or any rule, regulation, or order thereunder.

Bond requirement when complainant is nonresident; waiver

(d) In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be

issued by the Commission against the complainant on any counterclaim by respondent: *Provided*, That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

Reparations

(e) If after a hearing on a complaint made by any person under subsection (a) of this section, or without hearing as provided in subsections (b) and (c) of this section, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Commission under such rules and regulations as it shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Commission with respect to the undisputed sum.

Enforcement of reparation award

(f) If any person against whom an award has been mad
not pay the reparation award within the time specified
Commission's order, the complainant, or any person for
benefit such order was made, within three years of the date
order, may file a certified copy of the order of the Commiss
the district court of the United States for the district in wh
resides or in which is located the principal place of business
respondent, for enforcement of such reparation award by
priate orders. The orders, writs, and processes of such c
court may in such case run, be served, and be returnabl
where in the United States. The petitioner shall not be lia
costs in the district court, nor for costs at any subsequent s
the proceedings, unless they accrue upon his appeal. If th
tioner finally prevails, he shall be allowed a reasonable atto
fee, to be taxed and collected as a part of the costs of the sui
ject to the right of appeal under subsection (g) of this secti
order of the Commission awarding reparations shall be fin
conclusive.

Review

(g) Any order of the Commission entered hereunder sh
reviewable on petition of any party aggrieved thereby, t
United States Court of Appeals for any circuit in which a h
was held, or if no hearing was held, any circuit in which the
lee is located, under the procedure provided in section 9
title. Such appeal shall not be effective unless within 30 day
and after the date of the reparation order the appellant als
with the clerk of the court a bond in double the amount
reparation awarded against the appellant conditioned up
payment of the judgment entered by the court, plus intere
costs, including a reasonable attorney's fee for the appellee
appellee shall prevail. Such bond shall be in the form of
negotiable securities having a market value at least equiva
the amount of bond prescribed, or the undertaking of a

company on the approved list of sureties issued by the T
Department of the United States. The appellee shall not b
for costs in said court. If the appellee prevails, he shall be
a reasonable attorney's fee to be taxed and collected as a
his costs.

Penalty

(h) Unless the registrant against whom a reparation or
been issued shows to the satisfaction of the Commission
fifteen days from the expiration of the period allowed f
pliance with such order that he has either taken an appeal
in authorized or has made payment in full as required
order, he shall be prohibited from trading on all contract
and his registration shall be suspended automatically at t
ration of such fifteen-day period until he shows to the sati
of the Commission that he has paid the amount therein s
with interest thereon to date of payment: *Provided,* Th
appeal the appellee prevails or if the appeal is dismissed t
matic prohibition against trading and suspension of regi
shall become effective at the expiration of thirty days f
date of judgment on the appeal, but if the judgment is sta
court of competent jurisdiction the suspension shall becon
tive ten days after the expiration of such stay, unless prior
the judgment of the court has been satisfied.

Effective date

(i) The provisions of this section shall not become effec
til fifteen months after October 23, 1974: *Provided,* Tha
which arise within one year immediately prior to the
date of this section may be heard by the Commission af
fifteen months period.

Section 17(b)(10), 7 U.S.C. § 21(b)(10)

§ 21(b)(10). Standards for registration; Commis

(b) An applicant association shall not be reg
tures association unless the Commission finds,
established by the Commission, that—

(10) the rules of the association provid
equitable procedure through arbitration or
settlement of a customer's claims and grieva
member or employee thereof: *Provided,* Th
such procedure by a customer shall be vo
procedure shall not be applicable to any cl
$15,000, (iii) the procedure shall not result
sory payment except as agreed upon between
(iv) the term "customer" as used in this sub
include a futures commission merchant or a